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Supreme Court of the United States

October Term, 1969

No. 932

NATIONAL ASSOCIATION OF THEATRE OWNERS and
JOINT COMMITTEE AGAINST TOLL TV,
Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA
and
ZENITH RADIO CORPORATION
and
TECO, INC.,
Respondants.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The National Association of Theatre Owners and Joint Committee Against Toll TV ("Petitioners") pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of

Columbia Circuit entered in this case on September 30, 1969.[1]

OPINION BELOW

The opinion of the Court of Appeals (Appendix A) has not yet been reported.

JURISDICTION

The judgment of the Court of Appeals was entered September 30, 1969. The jurisdiction of this Court is invoked under 5 U.S.C. 1034 and 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission ("Commission") possesses the statutory authority to authorize a permanent nation-wide television broadcast service which requires the direct payment of fees by members of the public to broadcast licensees in order to receive the pay broadcast service; and

2. Whether, assuming the requisite statutory authority, the Commission's recent action establishing a nation-wide pay television service, and promulgating rules to regulate that service, improperly, arbitrarily and unconstitutionally discriminates against lower income groups.

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[1] The National Association of Theatre Owners is a nation-wide organization consisting of owners of motion picture theatres throughout the United States. The Joint Committee Against Pay TV is a voluntary association organized for the purpose of opposing Federal Communications Commission authorization of pay television. The Petitioners participated in the rule making proceeding before the Federal Communications Commission, which culminated in the Commission's authorization of a nation-wide pay television system, and were the petitioners who obtained review of the Commission Order in the United States Court of Appeals for the District of Columbia Circuit.

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The pertinent sections of the Constitution (Amendments I and XIV) and the Communications Act of 1934, as amended, 48 Stat. 1064, 50 Stat. 191, 66 Stat. 715, 47 U.S.C. 151, *et seq.* (Sections 153(o), 301, 303, 326) are set out in Appendix B.

STATEMENT

This Petition seeks review of a decision by the United States Court of Appeals for the District of Columbia Circuit in a matter which the Court below termed "a question of national importance, *id est,* whether the Federal Communications Commission possesses the requisite power to authorize nationwide over-the-air subscription television (commonly referred to as pay 'TV') on a permanent basis" (Slip Opinion, p. 2, footnote omitted). This issue vitally affects literally tens of millions of viewers in their economic and social lives. Because of the drastic change in the nature of American broadcasting which pay television may well cause, the issue here presented is perhaps the most far-reaching and important question of statutory interpretation of the Communications Act which has come before this Court since its landmark 1943 decision in *National Broadcasting Co. v. United States,* 319 U.S. 190 (1943).

American radio and television have traditionally been free in that the listening and viewing audiences, after purchasing their sets, pay no direct charges to the originating stations for receiving programs which those stations broadcast. The distinction between American broadcasting and that of foreign countries, where such charges often exist in the form of taxes or listening fees, was specifically and repeatedly recognized in the early congressional debates on the Radio Act of 1927 (see 67 Cong. Rec. 5490-1, 12335). It was in this framework that government regulation of broadcasting began.

In 1955, the Commission, in response to petitions by a number of pay television proponents, instituted a Notice of Proposed Rule Making,[2] inviting Comments to determine whether pay television would be in the public interest, and requesting Comments on whether the Commission had the statutory power to authorize such operations.[3] Thereafter, in a 1957 Notice of Further Proceedings,[4] the Commission announced that the Comments did not provide an adequate basis for arriving at a final decision, and that trial demonstrations would be necessary before a final decision could be made. Subsequently, the Commission issued its First Report on Pay Television[5] which concluded that the Commmission had power to authorize over-the-air pay television under the present Act, and which listed the conditions under which applications for trial operations would be accepted.

The issuance of the First Report stirred critical congressional comment. The House Committee on Interstate and Foreign Commerce, after hearings, adopted a resolution stating that the Commission should *not* act to authorize pay television operations until the Communications Act was specifically amended to grant such power to the Commission.[6] In response, the Commission issued

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[2] Matter of Subscription Television Service, F.C.C. 55-165, released February 10, 1955, 20 F.R. 988.

[3] Pay television was described by the Commission as the transmission of programming paid for by the public on a subscription basis.

[4] 22 F.R. 3758 (1957).

[5] Matter of Subscription Television Service, First Report, 23 FCC 532, 16 Pike and Fischer, RR 1509 (October 1957).

[6] The basis of congressional concern was that trial operations, inevitably requiring large investments, would establish pay television as a *fait accompli* before Congress could consider appropriate legislation. See remarks of Congressman Oren Harris, Chairman of the House Interstate and Foreign Commerce Committee, 105 Cong.Rec. 4812.

its Second Report[7] which withheld the processing of applications under the First Report until the expiration of the 85th Congress, a policy which was voluntarily continued by the Commission until the end of the 86th Congress.

Upon the expiration of the 86th Congress, the Commission issued its Third Report.[8] The Third Report readopted and reaffirmed virtually all the conditions for trial operation set out in the First Report,[9] and indicated that when "sufficient and meaningful data" became available, the Commission would hold public hearings to decide whether pay television should be permanently authorized (Third Report, *supra*, at Par. 27; First Report, *supra* at Par. 92). Only three applications were ever filed for trial operations pursuant to the Third Report, and of these only one ever went into operation, Station WHCT, Hartford, Connecticut.[10]

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[7] Matter of Subscription Television Service, Second Report, 16 Pike and Fischer, RR 1539 (February 1958).

[8] Matter of Subscription Television Service, Third Report, 26 FCC 265, 16 Pike and Fischer, RR 1540a (March 1959).

[9] Operational limitations were set out to protect the public and to limit the scope of the trial. See Third Report, Pars. 6, 19, 20-22, 26-27, 26 FCC at 266, 269-71, 16 Pike and Fischer, RR at 1540b, 1540e through g.

[10] The application by Station KVUE for Channel 40, Sacramento, California, was denied for failing to comply with the conditions of the Third Report. A second applicant, Station KTVR, Channel 2, Denver, Colorado, obtained authorization, but did not engage in pay television operations and later relinquished its authorization. See Fourth Report, Par. 4, 15 FCC 2d at 467.

The Hartford experiment began in the summer of 1962. At its height, it involved no more than approximately 5,000 subscribers, and during much of its lifetime the number of subscribers was considerably less.

In 1965, pay television proponents filed a Petition for Further Rule Making requesting the establishment of a nation-wide permanent pay television system, which, in 1967 culminated in the Commission's Subscription Television Committee (which consisted of 3 Commissioners), submitting for Commission consideration a Proposed Fourth Report which proposed the establishment of a permanent pay television service. Oral argument on the Fourth Report was held before the Commission *en banc* in 1967.

As was the case with the First Report, the proposed Fourth Report stirred critical congressional comment. The Communications and Power Subcommittee of the House Interstate and Foreign Commerce Committee, after hearings, recommended, and on November 16, 1967, the full Committee on Interstate and Foreign Commerce adopted, a resolution stating the sense of the full Committee that the Commission should refrain from taking any action on its Proposed Fourth Report for one year, or until the Communications Act of 1934 was amended to authorize pay television.[11]

On September 3, 1968, the Commission, by Chairman Hyde, sent a letter to the Chairman of the Committee on Interstate and Foreign Commerce indicating that in view of the lengthy consideration which had already been given the matter, the Commission did not

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[11] The reasons for the Committee's resolution were the Committee's views that: (1) the systems, thus far tested, were "inconclusive" as to whether the public interest would be served, (2) the systems had been unable to demonstrate the ability of pay television to offer new, different, or "higher quality" viewing, (3) the development of public television might adequately fill the need for additional cultural programming, and (4) it had not been established to the satisfaction of the Committee that authority to license pay television operation came within the power of the Commission under the Communications Act. See Fourth Report, Par. 15, 15 FCC 2d at 470.

believe it could delay resolution of the question. On September 11, the Commerce Committee, in response, adopted a resolution indicating the sense of the Committee to be that the Commission should further refrain from acting until the end of the first session of the 91st Congress, or until the completion of action upon legislation if by the end of the first session legislation pertaining to the question was under consideration.[12]

Thereafter, on December 13, 1968, the Commission issued its Fourth Report, which is the subject of the opinion of the Court of Appeals here sought to be reviewed. In the Fourth Report the Commission reaffirmed its prior holding that it possessed the requisite statutory power to permanently authorize pay TV,[13] stated its belief that pay TV would provide "a beneficial supplement" to the program choices now available,[14] and established the regulatory framework for a permanent nation-wide pay television system, indicating the

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[12] The September 11 resolution was passed by a vote of 16 to 13. A minority of the Committee sent a letter to the Commission indicating their belief that the Commission should act on the matter. Fourth Report, Par. 18, 15 FCC 2d at 471-472.

[13] Fourth Report, Par. 12, 15 FCC 2d at 468-69.

[14] See Fourth Report, Pars. 27-69, particularly Pars. 59-69, 15 FCC 2d at 474-488. By "beneficial supplement" the Commission meant only that pay television programming would not be "duplicative" of free television, and that the Commission believed it was desired and needed by at least a portion of the viewing public. The term was not meant to connote lack of impact upon free television, which the Commission treated as a separate question (Fourth Report, footnote 20, 15 FCC 2d at 473).

requirements which must be met by applicants seeking pay television authorizations.[15]

While establishing a permanent pay television system, the Commission, nevertheless, recognized that Pay TV will not, in fact, present minority-type programming to any significant degree, and will, instead, aim at the mass market to maximize profits (Fourth Report, Par. 68, 15 FCC 2d at 487-88). The Commission emphasized its belief that "the preservation of conventional television service and the continued availability of good program material to the free service . . . [were] extremely important considerations" (Fourth Report, Par. 90, 15 FCC 2d at 495). The Commission also emphasized that it "would not consider [it] to be in the public interest" for certain types of program material now presented on the free service to be lost to the pay television operation (Fourth Report, Par. 130, 15 FCC 2d at 508). In order to prevent this possibility, the Commission adopted

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[15] See Fourth Report, passim. Among the conditions governing pay television were provisions concerning the technical performance of the system, requirements that all systems broadcast at least 28 hours per week of free programming, that no pay television station enter into a contract which would deprive it of complete freedom over the programs to be broadcast, or the terms of payment, that pay television decoders could only be leased, not sold, and that service would have to be rendered to all persons desiring it within the Grade A contour of the station unless a satisfactory signal is not available. (See Pars. 154-276, 339-348, 15 FCC 2d 515-54, 573-77).

certain detailed restrictions on the type and content of pay television material which may be broadcast.[16]

The Commission specifically refused to adopt any rules govering the rates to be charged to the public, and *refused even to decide whether it had the power to do so.* It held that its power to authorize pay television permanently was not "dependent" upon the power to regulate rates (Fourth Report, Par. 259, 15 FCC 2d at 547).

Although the Commission rejected the argument that its programming restrictions violated the anti-censorship provisions of the Communications Act (47 U.S.C. 326), and similarly rejected the argument that such restrictions were a violation of the First Amendment of the Constitution, nevertheless, the Commission

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[16] These restrictions included:

(i) No motion picture (with a number of exceptions) can appear on pay television if the picture is more than 2 years old;

(ii) Sports programs "regularly televised in the community via free TV during the previous 2 years" cannot be presented over pay television (Fourth Report, Pars. 289, 305, 15 FCC 2d at 558, 564).

(iii) Pay television stations are prohibited from presenting any "series type program with inter-connected plot or substantially the same cast of principal characters."

(iv) The Commission recognized that movies and sports would probably be the overwhelming program fare to be presented on pay television. In order to insure that at least some pay television programming would be other than feature films and sports events, the Commission provided that no more than 90% of the total programming hours could be composed of programs falling into these two categories.

These program restrictions are rather complex, and the Commission devoted numerous pages of its opinion to explicating them. Fourth Report, Pars. 284-310, 15 FCC 2d at 556-565.

made it quite clear that it would not have approved the establishment of a pay television system in the absence of the authority to lay down such restrictions (see Fourth Report, Pars. 130, 284, 311-313, 15 FCC at 507, 556, 565-66).

At Petitioners' request, the Court of Appeals for the District of Columbia Circuit reviewed the Commission's determinations pursuant to the judicial review provisions of Section 402(a) of the Communications Act (47 U.S.C. 402(a)). The Court affirmed, in all respects, the Fourth Report. In brief, the Court held that the Commission possessed the statutory power to authorize a permanent pay television system, basing its holding on the grounds that the statute did not explicitly forbid the authorization of such a system, that the courts have traditionally interpreted the Communications Act expansively in view of the dynamic characteristics of the radio industry, and that the courts have traditionally followed an agency's interpretation of its organic statute, rather than substitute its own interpretation.[17] The Court rejected the argument that congressional failure to include the power to regulate the rates charged by pay television demonstrated the Commission's lack of power to authorize the system,[18] and similarly rejected the argument that authorizing a pay television system improperly and unconstitutionally discriminated against low income groups in the United States[19] which the Commission itself recognized would not be able to take advantage of the

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[17] Slip Opinion, pp. 7-15.

[18] *Id.* at pp. 15-18.

[19] *Id.* at pp. 19-24.

service, and at whose expense the service would be established. The instant Petition followed.[20]

REASONS FOR GRANTING THE WRIT

1. As the Court below indicated, this case involves an issue "of national importance" (Slip Opinion, p. 2) and one "of first impression" (Slip Opinion, p. 11) concerning what is clearly one of the most important questions of interpretation of the Communications Act of 1934, as amended, that has ever been brought before the courts. Whether the Federal Communications Commission has the statutory authority under the present Act to create a nation-wide pay television system, is a question the resolution of which vitally affects every citizen. It affects the nature and the amount of information, knowledge and entertainment which the population of the entire country will receive.

In affirming the Commission's authorization of a permanent pay television system, the Court below recognized the novelty of the issue, and the fact that, primarily because of this novelty, the legislative history of the Act shed little light on the scope of the Commission's power (see Slip Opinion, pp. 13-15).[21] The Court did not base its holding upon this legislative history, but

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[20] Upon Petitioners' request, the Court of Appeals for the District of Columbia Circuit has stayed the issuance of its mandate pending the filing of the instant Petition for certiorari. The Commission itself had previously announced that it would not grant any application for pay television authorization until 60 days after the opinion of the Court of Appeals in this matter. Petitioners have requested that this policy be continued by the Commission until the conclusion of the litigation before this Court.

[21] The Court also pointed to proceedings in the Congress which have been pending for many years, and particularly to Congress' inability to agree on the scope of the Commission's power in this area (Slip Opinion, pp. 14-15, footnote 25).

upon (a) the lack of a specific prohibition in the statute *forbidding* the Commission to authorize pay television, (b) the general judicial doctrine of "expansively" interpreting the Communications Act in such a way as to enable the Commission to cope with new problems while avoiding "the necessity of repetitive legislation" (Slip Opinion, p. 9), and (c) by applying the traditional theory of judicial deference to an administrative agency's interpretation of its organic statute. Petitioners do not quarrel with the general validity of these judicial axioms. But Petitioners respectfully submit that these legal generalities do not, and cannot suffice to settle the important specific issues here raised.

There is no question that the Communications Act sets out a broad regulatory scheme which has enabled the Commission to license diverse uses of the radio spectrum, and indeed has enabled the Commission to proceed in areas of developing technology in order to protect the integrity and efficacy of the Commission's ability to exercise its statutory responsibilities.[22] But it is also true that the Commission's powers are not all-encompassing. This Court pointed out in *National Broadcasting Co. v. United States,* 319 U.S. 190, 219 (1943) that Congress did not give the Commission "unfettered discretion to regulate all phases of the radio industry." Many matters regarding the manner in which broadcast stations derive their revenues and programming were

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[22] See, *e.g., National Broadcasting Co. v. United States,* 319 U.S. 190 (1943). See also *United States v. Southwestern Cable Co.,* 392 U.S. 157 (1968) in which this Court held that the Commission had power to regulate aspects of the newly developed "cablevision" industry because failure to regulate would render the Commission less able to carry out the functions entrusted to it by Congress, a result which could not have been intended by Congress when it enacted the organic statute.

never considered as being within the Commission's regulatory jurisdiction.[23] Other limitations upon the Commission's power appear despite the broad regulatory scheme. *Pulitzer Publishing Co. v. Federal Communications Commission*, 68 App. D.C. 124, 126, 94 F.2d 249, 251 (1937) and *Sanders Bros. Radio Station, supra,* strongly suggest that rate regulation vis-a-vis broadcast licensees and the public was not encompassed by the Commission's regulatory scheme. Congress itself has indicated (House Report No. 1559, 87th Cong. 2d Session) that it was not Congress' intention "that the Commission should have authority to prescribe [manufacturing] standards [of television equipment] on the basis of any of its existing powers under the Communications Act" (Pike and Fischer, Current Service, p. 10:485). These limitations exist despite the lack of any specific statutory prohibition.

Petitioners respectfully urge that the Court below applied an inappropriate legal standard by, in effect, requiring that the Act specifically prohibit the creation of a pay television system before it would hold that the Commission did not have such power. It may well be that congressional failure to enact a specific prohibition would be dispositive of an issue concerning circumstances of which Congress was well aware when it enacted legislation. But it is unpersuasive to assert that Congress would have enacted a specific prohibition against pay television when, at the time of the enactment of the Act, the hallmark of the American broadcasting industry was the *absence* of a direct charge to the viewer.

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[23] This Court stated in *Federal Communications Commission v. Sanders Bros. Radio Station,* 309 U.S. 470, 475 (1940) that "the Act does not essay to regulate the business of the licensee. The Commission is given no supervisory control of the programs, of business management or of policy."

The inauguration of a permanent pay television system is more than a mere variation in the broadcasting art. It introduces the most fundamental change in broadcasting that has occurred since the adoption of the original Radio Act in 1927. It erects a system whereby the use of a scarce and valuable public broadcasting frequency which, by Section 3(o) of the Act (47 U.S.C. 153(o)), was intended for the "dissemination of radio communications intended to be received by the public" will now be available *not* to all the public, but only to those who can afford to pay a fee for its use, thus, effectively depriving many persons, particularly those in the lower income groups of the United States, of the use of a broadcast frequency. It creates, in essence, a second class citizenry with respect to access to broadcast frequencies. Matters of such fundamental importance should not be left to regulation by administrative agencies through inference, assumptions and deductions. As this Court noted in *Interstate Commerce Commission v. United States ex rel. Los Angeles,* 280 U.S. 52, 69 (1929), "[a] proper statute would seem to require detailed directions, and we should expect the intention to be manifested in plain terms and not to be left to be implied from varied regulatory provisions of uncertain scope."

But the Commission's lack of authority is indicated not only by failure of the Act to explicitly allow the authorization of pay television. It is most effectively demonstrated by the omission from the Act of authority for rate regulation by the Commission of the prices to be charged the public. Indeed, the proponents of pay television have consistently and vigorously asserted that the Act does *not* give the Commission the authority to regulate rates. The Commission has compounded the paradox by refusing to decide whether it has the power to regulate pay television rates under the present Act. And the Commission's refusal to decide this issue has

now been upheld by the Court below, so that the Commission may very well be launching a system over which it has no effective regulatory power to protect the public.

Although the Commission and the court below have refused to decide the matter, the question of whether the present Act allows for rate regulation is critical to the interpretation of the Commission's authority under the Act to authorize pay television. The reason is simply that, viewing congressional precedents in such matters, it is inconceivable that Congress would have allowed broadcast licensees to charge for the use of what are conceded to be public facilities without either explicitly authorizing such rate regulation or, at the very least, establishing a regulatory scheme to oversee it. This is demonstrated by the conceded fact that in the Communications Act, and indeed in every other Act of which petitioner is aware in which the public was to be charged direct fees for the use of public or quasi-public facilities, Congress specifically enacted detailed provisions governing Commission regulation of such charges.[24] The absence of such specific authorization in the Communications Act with respect to broadcast frequencies persuasively indicates that Congress did not intend that the general public be directly charged for the use of its own airways.

The Court rejected Petitioners' contentions on two somewhat contradictory grounds. The Court first asserted (Slip Opinion, pp. 16-17) that the difference in treatment between broadcast licensees and "common carriers"

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[24] This was not only true in the Communications Act itself (see, *e.g.*, 47 U.S.C. Secs. 201-211), but also in the Interstate Commerce Act (49 U.S.C. Secs. 1-23), the Motor Carrier Act (49 U.S.C. Sec. 316), the Aviation Act (49 U.S.C. Sec. 1374), and the Shipping Act (46 U.S.C. Sec. 817).

reflected Congressional belief that broadcasting is not a "natural monopoly," and that the dangers of monopolies would be handled by the "competition among those providing broadcasting services in a given area." The Court appeared to believe that the absence of rate regulation was not related to any cost relationship to the public vis-a-vis the licensee, but rather to the existence of limited competition among licensed radio stations.

But there are two difficulties with this analysis. First, the Court failed to recognize the significance of the fact that under the Commission's proposed licensing scheme *there will be a natural monopoly* for the pay television licensee in a given community. The Commission has created a regulatory framework whereby there will be only *one* pay television station in each community, so that there will be in pay television precisely the "natural monopoly" that the Court held not to exist in the case of conventional broadcasting systems (Fourth Report, Pars. 125, 165, 200, 15 F.C.C. 2d at 505, 518, 528).

Perhaps more important, the Court's analysis is logically deficient because it is at least as likely (if not more likely) that Congress drew a distinction between common carriers, on the one hand, and broadcasting, on the other, *precisely because there was to be no direct charge levied by the broadcast licensee upon the general public.* The question is whether Congress would have eschewed rate regulation with respect to broadcast frequencies if it intended that those frequencies could only be reached by that segment of the public willing to pay a fee. Petitioners believe the answer to be clearly in the negative, particularly since such a course would be singularly unprecedented in Congressional annals. It is difficult to believe that Congress would have allowed the imposition of a direct fee system without at the same time giving the Commission the power to regulate the heart of that system, *i.e.*, the direct fees to be charged to the public.

The Court itself appeared to be concerned with the anomaly of Congress allowing a direct fee system to be instituted without giving the Commission the proper regulatory tools to prevent abuse. Thus, as its second ground for affirmance the Court suggests, as did the Commission, that the Commission possesses appropriate regulatory tools "through the licening process." (Slip Opinion, p. 17). But this analysis, it is submitted, begs the question. If, as pay TV's proponents vigorously assert (and the Commission has not denied the validity of the assertion), the Commission is without power to regulate the rates charged directly, it is difficult to see how these rates could be regulated indirectly through the licensing function. If regulation of rates is not within the Commission's province, how could the Commission condition its licensing functions upon factors such as the reasonableness of the rates charged? What the Commission cannot do directly, cannot be done indirectly merely by the assertion that it is being done in the furtherance of its "licensing" authority.[25]

The question to be decided is not (as the Court below appears to believe) whether the Commission should at this time institute rate regulation.[26] The real issue is what light the absence of the power to regulate rates sheds upon Congressional intent with respect to Commission authority to authorize a permanent pay television system. Petitioners submit that the absence of

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[25] For example, Section 326 of the Communications Act (the anti-censorship provisions) prohibits the Commission from requiring a broadcast station to take a particular editorial stance. But it is inconceivable that the Commission would, nonetheless, be allowed (or indeed would even attempt) to condition the grant of a license upon the taking of an editorial position by an individual station.

[26] It very well may be, as the Court suggested, that the question of whether the Commission should now institute rate regulation need not be settled, and may await future developments.

such power is indicative of Congressional intent *not* to allow the Commission to authorize a permanent pay television system.

There is yet a third indicia of absence of authority: the fact that interpreting the Act in the manner claimed by the Commission results in introducing concepts which are directly inconsistent with the specific anti-censorship provisions of Section 326 of the Act, (47 U.S.C. 326) and which would raise the most serious Constitutional questions. The courts have traditionally been loath to interpret statutes in such a manner.

Section 326 provides that the Commission cannot enact any regulation or condition "which shall interfere with the right of free speech by means of radio communication." Yet the Commission has enacted precisely such restrictions on free speech by forbidding pay television from presenting particular types and/or percentages of programming material.[27] Thus, the Commission has proposed to issue a broadcast license for a broadcast service upon the specific condition that the licensee not present certain types or exceed fixed percentages of program material, the proscription being in terms of the form of the media, the program content, and the program structure. And the Commission made it absolutely clear that the imposition of these conditions was an essential element of its decision to authorize a permanent pay television system. The Commission stated that unless these conditions were established, it would *not* have authorized a permanent pay television system.[28] It must be emphasized that these restraints

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[27] Thus, the Commission has forbade the broadcast over pay television systems of certain motion pictures, sports events, and other specific types of programming material. See Fourth Report, Pars. 284-309, 15 F.C.C. 2d at 556-565.

[28] See Fourth Report, Pars. 130, 284, 15 F.C.C. 2d 507, 556.

and restrictions upon a licensee's right to broadcast types of programming are singular and unprecedented. The Commission has never before attempted to impose such restraints upon the types of programs which may be presented by broadcast licensees; indeed, as recently as 1960, the Commission itself specifically rejected the notion that it could condition a grant, denial or revocation of a license upon the Commission's "own subjective determination" as to programming.[29]

The Commission's imposition of these restrictions is not only contrary to its own prior interpretations of its powers over programming under the Act; it is contrary to repeated judicial interpretations. In *Federal Communications Commission v. Sanders Bros. Radio Station*, 309 U.S. 470, 475 (1940), this Court stated:

> "The Commission [was] given no supervisory control over the programs . . . [to be presented by broadcast facilities]."

To the same effect, see *McIntire v. William Penn Broadcasting Co.*, 151 F.2d 597, 599 (3d Cir.), *cert. denied*, 327 U.S. 779 (1945):

> [It] is clear from history and the interpretation of the Federal Communications Act that the choice of programs rests with the broadcasting stations licensed by the F.C.C.

And see *Pulitzer Publishing Co. v. Federal Communications Commission*, 68 App. D.C. 124, 126, 94 F.2d 249, 251 (1937):

> The licensee of a radio station chooses its own advertisers and its own programs . . . .

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[29] See 1960 *Report on Programming Policy*, 20 Pike & Fischer, RR 1901, 1907, 1909.

The restraint is even more repugnant where, as here, it is a *prior* restraint, a form of restraint particularly repugnant to our institutions:

> This Court recognized many years ago that . . . a previous restraint is a form of infringement upon freedom of expression to be especially condemned.[30]

In the instant case, the Court below upheld the Commission's restrictions, but did so on the basis of contentions which, it is submitted, cannot withstand critical analysis. The Court placed reliance on the fact that the Commission, acting in good faith, adopted restraints for the purpose of gaining more rather than less programming, and "sought only to insure the continuing economic vitality of free television" (Slip Opinion, p. 25). But the courts have long recognized that a direct prior restraint upon the content of protected speech cannot be sustained on the grounds that the legislature or administrative agency acted "reasonably," or with the purest of intentions. This Court made clear in *Thomas v. Collins,* 323 U.S. 516, 530 (1945) and *Mills v. Alabama,* 384 U.S. 214 (1966) that the validity of a free speech restriction cannot be tested by such criteria as the sincerity of purpose of the enacting body, or whether the enactment is reasonably calculated to achieve an otherwise valid result. The Court of Appeals itself recognized in a recent decision *Banzhaff v. United States,* U.S. App. D.C. , 405 F. 2d 1082, 1096

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[30] *Joseph Burstyn, Inc. v. Wilson,* 343 U.S. 495, 503 (1952). There can be no doubt that if such a direct, prior restraint as is here present were placed on matter in newspapers or motion picture films, the restraint would be struck down as unconstitutional, even if specifically authorized by the appropriate legislative body. *Grosjean v. American Press Co.,* 297 U.S. 233 (1936); *Near v. Minnesota,* 283 U.S. 697 (1931); *Superior Films, Inc. v. Department of Education,* 346 U.S. 587 (1954).

(1968) *cert. denied, sub. nom. Tobacco Institute v. Federal Communications Commission,* 395 U.S. 973 (1969), that restraints upon a licensee's discretion cannot be upheld "merely upon the ground that it may reasonably be thought to serve the public interest."

In defending the Commission's restriction, the Court below appeared to draw a distinction between protection accorded to general programming material, on the one hand, and that accorded to "ideas" and "debate on public issues" on the other (Slip Opinion, pp. 25-26), the latter, according to the Court, being more "central concerns of the First Amendment" than the former. But this analysis is one which creates distinctions flatly rejected by this Court in numerous cases, principally *Winters v. New York,* 333 U.S. 507 (1948). In *Winters* the Court made clear that there are no degrees of protection accorded to various categories of speech depending upon whether they fall within the realm of "entertainment" or doctrinal polemic (333 U.S. at 510):

> The line between the informing and the entertaining is too elusive for the protection of that basic right (a free press). Everyone is familiar with instances of propaganda through fiction. What is one man's amusement, teaches another's doctrine.

This Court recognized in *Red Lion Broadcasting Co. v. Federal Communications Commission,* 395 U.S. 367, 396 (1969) that "the Commission's refusal to permit the broadcaster to carry a particular program . . . . would raise . . . . serious first amendment issues." The Commission has now enacted precisely such a refusal in its Pay

TV restrictions and has presented the issue which was not present in *Red Lion.*[31]

But the principal error of the Court below lies not so much in allowing the imposition of prior restraints, but in failing to recognize that the Commission's position does, in fact raise a serious question of prior restraints. The primary issue before the Court is the interpretation of the Commission's authority under the Communications Act. In order to sustain its interpretation, the Commission has forced an interpretation of the Act in a manner which appears not only *prima facie* inconsistent with the explicit anti-censorship provisions of Section 326, but which raises grave First Amendment questions. As this Court held in *Hannegan v. Esquire,* 327 U.S. 146, 156 (1946), a statute will not be gratuitously interpreted in such a manner as to clothe an agency with authority which, if exercised, would raise the gravest constitutional objections:

> The provisions of the [governing statute] would have to be far more explicit for us to assume that Congress made such a radical departure from our traditions . . . .

See also *Greene v. McElroy,* 360 U.S. 474 (1959); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127 (1961); *Kent v. Dulles,* 357 U.S. 116, 130 (1958).

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[31] The instant case is unlike *Red Lion* in other respects. In *Red Lion* the Court affirmed the Commission's power to enforce the "fairness doctrine," whereby each licensee is required to fairly present all sides of a particular issue. As the Court pointed out, the fairness doctrine acts not to restrict speech, but to enlarge the scope of material broadcast by licensees. In the instant case, the Commission is *not* enlarging the scope of material which will be presented, but, instead, is deliberately *restricting* it.

Finally, Petitioners believe that the establishment of pay television represents an unconstitutional discrimination against low income groups. The evidence before the Commission indicated that a pay television service is one which benefits the upper and middle income brackets at the expense of the lower income groups.[32] The Commission also indicated that only a small fraction of potential listeners will utilize the pay television frequency, so that the Commission has taken an over-the-air broadcast frequency, capable of reaching hundreds of thousands of persons, and has limited its use to a relatively few persons in the upper income brackets.[33]

Petitioners urged below that free television has now become such an essential service to the nation that it cannot legitimately be granted to one economic class and denied to another. Access to free television is of such fundamental importance that its denial, based upon economic circumstances, is a discrimination against the poor of constitutional dimensions.

The Court below refused to accept this argument, holding that "[s]uch a result would clearly be a constitutional innovation that we are unwilling to make . . . ." (Slip Opinion, p. 22). In view of the novelty of the question, it is perhaps understandable that the Court of Appeals was reluctant to go forward in this area. But

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[32] A breakdown of the Hartford trial subscribers demonstrated that virtually no persons in the income level $0-3,999, an income level which represents almost one-third of the families in the United States, were able to subscribe to the test (see Fourth Report, Pars. 86-87, 15 FCC 2d at 493).

[33] The fact that only a small minority of persons would use the pay television frequency was not only recognized by the Commission, but was the basis of the Commission's holding that institution of the service would not adversely affect the audience for free service (See Fourth Report, Par. 125, 15 FCC 2d at 505).

Petitioners believe that this Court should squarely face the issue, and declare that access to free television is a constitutionally protected right. This Court has recognized in other contexts that certain rights are so basic and fundamental that their deprivation to the poor is unconstitutional. In *Harper v. Virginia Board of Elections,* 383 U.S. 663, 668 (1966), the Court declared a state poll tax unconstitutional because it necessarily excluded from voting those "unable to pay a fee." In *Griffin v. Illinois,* 351 U.S. 12 (1956), the Court held constitutionally impermissible the refusal to give transcripts to indigents who were unable to pay a fee. There is growing recognition that because poverty often interferes with the ability of the poor to exercise their legal rights, it may be necessary to supply counsel in civil cases involving such matters as eviction proceedings, divorces and child custody suits, etc. See *Discrimination Against The Poor and the 14th Amendment,* 81 Harv. L. Rev. 435 (1967). Similarly, there is a recognition that, in order to fulfill their citizenship responsibilities, or, indeed, to effectively achieve their rights, the poor must have access to the mass media. See Barron, *Access To The Press – A New First Amendment Right,* 80 Harv. L. Rev. 1641 (1967); see also *Red Lion Broadcasting Co. v. Federal Communications Commission* 395 U.S. 367 (1969), in which the Court stressed the importance of access *by the public* to radio and television frequencies. At the very least, Petitioners urge that this Court recognize that access to broadcast frequencies (both as participants and as viewers) cannot legally, or indeed constitutionally, be based upon a pocket book test any more than can the right to vote.

In sum, the Court below has upheld an interpretation of the Communications Act which would allow perhaps the most drastic change in the structure of American broadcasting since the passage of the original Radio Act of 1927 in the face of the facts that:

1. The Commission's organic statute does not provide either explicitly or implicitly for such a change.
2. The Act does contain none of the normal regulatory powers which would have been included if Congress had intended to institute a direct fee system for the use of the public airway.
3. The Commission's interpretation creates the gravest constitutional questions and flies directly in the face of the specific anti-censorship provisions of Section 326 of the Act.
4. The Commission's interpretation of the Act has been challenged by important segments of the Congress as going far beyond the powers which Congress originally intended to grant.
5. The establishment of pay television represents a direct and unconstitutional discrimination against low income groups.

CONCLUSION

All of the above considerations indicate that the question here is, as the Court below correctly recognized, "one of national importance." Petitioners submit that it should be passed upon by this Court.

Respectfully submitted,

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December , 1969

APPENDIX A

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 22,623

NATIONAL ASSOCIATION OF THEATRE OWNERS
and JOINT COMMITTEE AGAINST TOLL TV,

Petitioners,

v.

FEDERAL COMMUNICATIONS COMMISSION and
UNITED STATES OF AMERICA,

Respondents,

ZENITH RADIO CORPORATION and TECO, INC.,

Intervenors.

Petition for Review of an Order of the Federal Communications Commission

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Decided September 30, 1969

Mr. Marcus Cohn, with whom *Mr. Martin J. Gaynes* was on the brief, for petitioners.

Mr. Daniel R. Ohlbaum, Deputy General Counsel, with whom *Mr. Henry Geller*, General Counsel, and *Miss Katrina Renouf*, Counsel, Federal Communications Commission, were on the brief, for respondent Federal Communications Commission. *Mr. John H. Conlin*, Associate General Counsel, and *Mrs. Lenore G. Ehrig*, Counsel,

Federal Communications Commission, also entered appearances for respondent Federal Communications Commission.

Mr. Howard E. Shapiro was on the brief, for respondent United States of America.

Mr. Harold David Cohen, with whom *Messrs. W. Theodore Pierson* and *Vernon C. Kohlhaas* were on the brief, for intervenors.

Before TAMM, LEVENTHAL and ROBB, *Circuit Judges.*

TAMM, *Circuit Judge*: Today we are faced with a question of national importance, *id est,* whether the Federal Communications Commission possesses the requisite power to authorize nationwide over-the-air subscription television[1] (commonly referred to as "pay TV") on a permanent basis. For the reasons hereinafter stated, we hold that the Commission can authorize such a service under the authority conferred upon it by the Communications Act of 1934, 48 Stat. 1064, *as amended,* 47 U.S.C. §§ 301-397 (1964), and that the Commission acted properly in prescribing rules for the development of this new service.

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[1] Over-the-air subscription television differs from conventional broadcasting in the nature of the signal that is transmitted; a subscription station broadcasts a "scrambled" signal that can be converted to intelligible form by special equipment which also assesses charges for the subscription programs viewed. CATV systems with direct cable links to subscribers' television sets are also technically capable of using similar devices to offer subscription services. The Federal Communications Commission investigated the possibility of authorizing subscription services on CATV networks, and concluded that the most efficient means of establishing pay television at present was through broadcasting stations. *See Fourth Report and Order on Subscription Television,* 15 F.C.C. 2d 466, 579-87 (1968) [hereinafter *Fourth Report].*

I. PROCEDURAL HISTORY

The history of the Commission's involvement with subscription television (hereinafter STV) is indeed lengthy. Nearly two decades ago, on February 25, 1952, the Zenith Radio Corporation filed a petition with the Federal Communications Commission requesting authority to institute a subscription television service.[2] On February 10, 1955, the Commission issued a *Notice of Proposed Rulemaking*, 20 Fed. Reg. 988, in which it requested comments from interested parties on the question of whether the Commission had the statutory power to authorize such operations. After voluminous responses to this inquiry were filed, the Commission released a *Notice of Further Proceedings*, 22 Fed. Reg. 3758 (1957), in which it announced that trial demonstrations of STV would be necessary before a final decision could be made. Shortly thereafter, on October 17, 1957, the Commission issued its *First Report* on subscription television, 23 F.C.C. 532, which concluded that the Commission could authorize pay television, but that trial operations should be conducted first. At this point Congress began to take notice of the problem, and the House Committee on Interstate and Foreign Commerce conducted hearings on the subject. Upon conclusion of these hearings, the Committee passed a resolution requesting the Commission to defer authorization of any STV operations. *See* 16 P&F RADIO REG. 1539-40 (1958). The Commission then issued its *Second Report*[3] on pay television which suspended the processing of all STV applications until the expiration of the 85th Congress; this delay was subsequently extended through the 86th Congress.

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[2] 20 Fed. Reg. 988 n.1 (1955).

[3] 16 P&F Radio Reg. 1539 (1958).

In 1959 the Commission issued its *Third Report* on subscription television, 26 F.C.C. 265, 16 P&F RADIO REG. 1540a, in which it reasserted the conditions for trial operations set out in the *First Report*. In addition, the *Third Report* stated that as soon as the trial operations provided sufficient data, public hearings would be held to determine whether STV should be authorized on a permanent basis. Pursuant to the *Third Report*, three applications were filed for trial STV operations; only one such station ever commenced operations, however.[4] This station, which was operated by Zenith Radio Corporation and its licensee Teco, Inc.,[5] intervenors in this action, began broadcasting over UHF station WHCT in Hartford, Connecticut during 1962. This operation was initially licensed for three years, but the license was subsequently extended for an additional three years in 1965; in 1968 it was again extended for three years, or until such time as the Commission authorized STV on a permanent basis. The Commission's authority to license the trial operation was approved by this court in *Connecticut Committee Against Pay TV v. FCC*, 112 U.S. App. D.C. 248, 301 F.2d 835, *cert. denied*, 371 U.S. 816 (1962).

In 1965 Zenith and Teco jointly filed a petition for further rulemaking to establish permanent nationwide STV on the basis of the data derived from their trial operation in Hartford. The Commission then issued, in 1966, a *Further Notice of Proposed Rulemaking and Notice of Inquiry*, 31 Fed. Reg. 5136, 7 P&F RADIO REG. 2d 1501, which, in essence, requested further

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[4] One of the three applications was denied; of the two which were granted, one station relinquished its license before commencing operations. *Fourth Report*, 15 F.C.C. 2d at 467.

[5] Zenith has patented "Phonevision," a system for over-the-air subscription television, and has licensed Teco to enfranchise local Phonevision operations. Brief for the Intervenors at 2 n. 1.

comments on the feasibility of nationwide STV. Subsequently, in 1967, the FCC's Subscription Television Committee submitted to the Commission a *Proposed Fourth Report*, 10 P&F RADIO REG. 2d 1617 (1967); the FCC, *en banc*, invited comments and held oral argument on the proposed report.

After the issuance of the *Proposed Fourth Report*, which concluded that the Federal Communications Commission did have statutory power to authorize permanent nationwide STV, the Communications and Power Subcommittee of the House Interstate and Foreign Commerce Committee conducted hearings on the subject of STV during the week of October 9, 1967. Upon conclusion of these hearings the full Committee recommended that the Commission refrain from taking any action for one year or until the Communications Act of 1934 was amended to authorize subscription television. *See* 15 F.C.C.2d at 466, 470. On September 3, 1968, the Commission, through Chairman Hyde, sent a letter to Chairman Staggers of the House Committee on Interstate and Foreign Commerce indicating that the Commission could not delay any further in resolving the important question of STV authorization.[6] The Commerce Committee responded on September 11, 1968, by adopting a resolution announcing that it was "the sense of the Committee" that the Commission should delay action on STV "until the end of the first session of the 91st Congress" or until "completion of action on legislation if by the end of said first session legislation pertaining to . . . [STV] is under consideration." The resolution went on to state that "it is the further sense of this committee that to avoid any further delay . . . hearings . . should be scheduled by the end of May 1969." 15 F.C.C. 2d at 471.

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[6] *Fourth Report*, 15 F.C.C. 2d at 470-71.

Finally, on December 12, 1968, the Commission issued its *Fourth Report* on subscription television, 15 F.C.C.2d 466, in which it reaffirmed its earlier conclusion that it possessed the power to authorize a permanent nationwide system of STV and established rules governing the operation of that system. The National Association of Theatre Owners and the Joint Committee Against Toll TV, participants in the Commission proceedings, filed a petition for review in this court pursuant to section 402 of the Communications Act, 47 U.S.C. §402 (1964), alleging statutory and constitutional errors in the Commission's determinations.

II. THE FOURTH REPORT

The Commission's *Fourth Report and Order* is a lengthy (144 pages) and carefully reasoned document which surveys the potential advantages and disadvantages of subscription television in light of the Hartford experiment and the contentions of various parties interested in pay television. On the basis of its seventeen-year inquiry into STV, the Commission concluded that subscription television would provide a "beneficial supplement" to conventional "free" broadcasts[7] in the sense that STV broadcasting "is not duplicative of the programming of free TV and that [it]

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[7] There is some question whether the term "free TV" is a misnomer; in the *Fourth Report*, for example, the Commission stated: "[F]ree TV is not really free. The advertising costs which support free TV are eventually passed on to the public, and a profit is made by the licensee or others from the use of the public's channels." 15 F.C.C. 2d at 548; *but cf. id.* at 548 n. 51; Brief for Petitioners at 39: "[E]conomists have contended that free television is indeed 'free' because, as more and more units of a particular commodity are sold, the purchase price goes down and the advertising costs are borne not by the public, but by the results of mass production."

is desired or needed by at least a portion of the viewing public." 15 F.C.C.2d at 473 n. 20; *see also id.* at 483-88. In considering the critical question of whether STV would have substantial adverse impact on free television, the Commission placed primary emphasis on the possibility that programs, audiences, and talent would be diverted ("siphoned") from free television to STV. Because the Commission recognized that the public's "tremendous investment . . . in television receivers based on the expectation of free service ought to be protected and the millions of viewers who rely on that service for free entertainment should be permitted to do so," it imposed a number of restrictions on STV operations. In brief, the Commission provided that STV stations could be established only in communities located entirely within the Grade A contours of five or more commercial broadcast stations, and that only one STV station could be located in each such community; that each STV station must broadcast at least twenty-eight hours per week of free programming; and that STV stations must observe detailed restrictions on the kind and quantity of subscription programs broadcast, in order to prevent "siphoning." *See* 15 F.C.C.2d at 494-95, 515-23, 595, 597, 598; *see also* pt. IVB, *infra.* Rules were also established governing the technical specifications and *modus operandi* of STV stations; *see* 15 F.C.C.2d at 544-48, 595-98. In promulgating these restrictions, the Commission attempted to strike a balance between the danger of allowing STV operations to acquire enough economic power to destroy free broadcasting, and the risk of hedging the new service with so many restrictions that it would "smother" before it ever got started. Thus, the Commission rejected the suggestion, urged by petitioners and others, that direct regulation of the rates charged by STV stations was necessary in order to prevent "gouging" of the public; instead, it concluded that the available evidence rendered this possibility remote, and that free market forces would be a sufficient

check on the prices charged for STV services. (*Id.* at 526, 548.) We hold that the Commission acted reasonably and within the scope of its authority, both in making its initial decision to authorize permanent nationwide STV and in imposing specific regulations governing subscription television.

III. THE COMMISSION'S POWER TO AUTHORIZE SUBSCRIPTION TELEVISION

The petitioners advance three arguments in support of their contention that the Commission exceeded the proper bounds of its power in authorizing nationwide subscription television. First, they assert that the Communications Act contains no explicit grant empowering the Commission to allow direct charges on the public for broadcast services, and that no such power can be inferred from the language or history of the Act (Brief for Petitioners at 17-21). Second, petitioners contend that the Commission lacks authority to regulate the rates charged for broadcast services, and that the absence of such authority is persuasive evidence of Congress' intent to preclude establishment of direct-charge broadcast operations such as STV (Brief for Petitioners at 21-24). Finally, petitioners claim that even if the Commission did have the necessary authority to establish pay television, its failure to regulate rates or to decide the question of whether it possessed rate-making power constituted an arbitrary and capricious exercise of this authority (Brief for Petitioners at 35-43). We shall consider each of these contentions separately.

A. *The Language and History of the Communications Act*

Our inquiry into the scope of the Commission's authority begins with section 303 of the

Communications Act of 1934, 48 Stat. 1082, *as amended,* 47 U.S.C. §303 (1964), which sets forth the Commission's general powers and duties in regulating radio broadcasting. In pertinent part, this section directs the Commission, "as [the] public convenience, interest, or necessity requires," to:

> (a) Classify radio stations;
>
> (b) Prescribe the nature of the service to be rendered by each class of licensed stations. . .;
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> . . . .
>
> (e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station. . .;
>
> . . . .
>
> (g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest.

In addition, section 307 of the Act, 47 U.S.C. § 307(a) (1964), provides that "[t]he Commission, if public convenience, interest, or necessity will be served thereby, subject to the limitations of this chapter, shall grant to any applicant therefor a station license. . . ."

We find it unnecessary to determine the precise significance as precedent of our ruling in *Connecticut Committee Against Pay TV v. FCC,* 112 U.S.App.D.C. 248, 301 F.2d 835, *cert. denied,* 371 U.S. 816 (1962). *Connecticut Committee,* which arose out of the same series of proceedings as this litigation,[8] dealt with the propriety of Commission authorization for a *trial* STV operation, and our opinion placed considerable emphasis

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[8] *See* part I, *supra.*

upon the experimental nature of the undertaking.[9] Thus, although *Connecticut Committee can provide assistance in our present inquiry, we feel it appropriate to give* fresh consideration to the question of whether the Federal Communications Commission has authority to license STV for an idefinite period.

The basic structure of title III of the Communications Act, from which the foregoing sections are quoted, is a broad grant of general licensing authority to the Commission, subject to a number of specific exceptions and limitations. (*See, e.g.*, 47 U.S.C. §§ 310, 312, 313(b) (1964).) This plan is consistent with the dynamic and rapidly-changing nature of the statute's subject matter, radio broadcasting, and the courts have consistently recognized that Congress intended to vest expansive powers in the Commission in order to avoid the necessity of repetitive legislation.[10] The classic

[9] In his opinion for the court, Judge (now Chief Justice) Burger pointed out that "Congress specifically commanded the Commission by Sec. 303(g) of the Communications Act, to 'study *new uses* for radio, *provide for experimental uses of frequencies*, and generally encourage the larger and more effective use of radio in the public interest.' " (Emphasis in original.) In addition, he concluded that "[t]he distinguishing characteristic of the Federal Communications Commission's authorization of subscription television in this case is the experimental or trial basis upon which the system is to operate for the duration of its three years authority." 112 U.S. App. D.C. at 250, 301 F.2d at 837.

[10] *See* General Telephone Company of California v. FCC, No. 22,106 (D.C. Cir. April 30, 1969) (slip op. at 15):

> Over the years, the Commission has been required to meet new problems . . . and as cases have reached the courts the scope of the Act has been defined, as Congress contemplated would be done, so as to avoid a continuing process of statutory revision. To do otherwise in regulating a dynamic public service function such as broadcasting would place an intolerable regulatory burden on the Congress—one which it sought to escape by delegating administrative functions to the Commission.

affirmation of the broad scope of the Commission's authority was enunciated nearly thirty years ago by the Supreme Court in *National Broadcasting Company v. United States:*

> In the context of the developing problems to which it was directed, the Act gave the Commission not niggardly but expansive powers. It was given a comprehensive mandate to "encourage the larger and more effective use of radio in the public interest". . . .
>
> . . . .
>
> . . . While Congress did not give the Commission unfettered discretion to regulate all phases of the radio industry, it did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency. That would have stereotyped the powers of the Commission to specific details in regulating a field of enterprise the dominant characteristic of which was the rapid pace of its unfolding.[11]

This continuing imperative need for an expansive interpretation of the Commission's jurisdiction was recently reaffirmed by the Supreme Court in *United States v. Southwestern Cable Co.*, 392 U.S. 157, 167-78 (1968), and has been observed repeatedly by this

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[11] 319 U.S. 190, 219 (1943); *see also* FCC v. Pottsville Broadcasting Co., 309 U.S. 134, 137-38 (1940).

court.[12] Morevoer, the Commission has devoted long and careful scrutiny to the question of whether it possesses authority to license STV operations, and has reached the conclusion that its jurisdiction under the Act is sufficient.[13] In this situation, we are bound to observe the "venerable principle that the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 (1969); *see also General Telephone Company of California v. FCC*, No. 22,106 (D.C. Cir. April 30, 1969) (slip. op. at 20).

Nothwithstanding this impressive body of authority, the petitioners contend that STV is clearly beyond the contemplation of the Communications Act. In essence, they assert that "over-the-air pay television represents a fundamental change in the nature of American Broadcasting" (Brief for the Petitioners at 13) and that therefore the power to license pay television cannot be inferred from the Act. Direct charges for broadcasting services are not wholly unprecedented in this country, however; testimony to this fact may be found in *Functional Music, Inc. v. FCC*, 107 U.S.App. D.C. 34, 274 F.2d 543 (1958), *cert. denied*, 361 U.S. 813 (1959), and *Muzak Corp.*, 8 F.C.C. 581 (1941). Indeed, we referred to these cases in *Connecticut Committee* as instances in which subscription services "have been found perfectly acceptable by both [the] Commission and the courts." 112 U.S.App.D.C. at 250 n.2, 301 F.2d at 837 n.2. Since the matter now before us is basically a

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[12] *See, e.g.*, Paducah Newspapers, Inc. v. FCC, No. 22,007 (D.C. Cir. June 30, 1969); General Telephone Company of California v. FCC, No. 22,106 (D.C. Cir. April 30, 1969); Buckeye Cablevision, Inc. v. FCC, 128 U.S. App. D.C. 262, 387 F. 2d 220 (1967).

[13] *See Fourth Report*, 15 F.C.C. 2d at 469-73; *First Report on Subscription Television*, 23 F.C.C. 532, 535-42 (1957).

question of first impression,[14] however, we have examined the legislative history of the Communications Act in order to evaluate petitioners' claim that subscription television is "the most fundamental change in broadcasting that has occurred since the adoption of the original Communications Act in 1927" (Brief for the Petitioners at 20).

The present statute governing the Commission's authority over broadcasting services is derived in large part from the Radio Act of 1927, 44 Stat. 1162.[15] Five years before the Radio Act was adopted, the problem of how radio broadcasts would be financed was still very much an open question. Proposals included endowment of stations by public-spirited citizens, municipal or state financing, donations from the listening public, and taxes on the sale of radio receivers; some variants of these schemes were attempted with limited success in the years preceding the Radio Act's passage.[16] The concept of advertiser-financed programs apparently was first

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14 Aside from *Connecticut Committee*, the *Functional Music* case parallels the facts of the instant controversy more closely than any other case which we have been able to discover. In *Functional Music*, however, we did not deal with the specific question of the FCC's authority to license direct-charge broadcasting services. The major issues in that case were whether this court possessed jurisdiction to review the Commission's action, and whether the Commission had erred in determining that functional broadcasting was point-to-point communication rather than broadcasting under the Act.

15 For a brief description of the early federal statutes governing broadcasting, *see* National Broadcasting Co. v. United States, 319 U.S. 190, 210-14 (1943).

16 *See* E. Barnouw, **A Tower in Babel: A History of Broadcasting in the United States** 154-57 (1966) [hereinafter **Barnouw**]; G. Archer, **History of Radio to 1926**, at 252-54 (1938) [hereinafter **Archer**].

developed on a systematic basis[17] by the American Telephone and Telegraph Company in 1922, as part of a plan which the company called "toll broadcasting";[18] initial public reaction to this system has been described as "lukewarm, and in some cases indignant."[19] Various forms of advertising soon became a commonplace adjunct of radio programs,[20] however, and in spite of occasional public and official attacks on the practice[21] it had become a well-established—but hardly universal—[22] method of financing radio programs by 1927 when congested air waves led Congress to establish detailed federal regulation of broadcasting.

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17 Apparently some sporadic efforts at radio advertising were made in the early 1920's when individual phonograph record merchants who supplied complimentary phonograph records for broadcasts began insisting on radio acknowledgment. *See* **Archer** 199.

18 *See* **Barnouw** 106-107; **Archer** 275-77.

19 **Barnouw** 106-07. *Cf.* **C. Siepmann, Radio, Television, and Society** 7 (1950) [hereinafter **Siepmann**]: "We are today so accustomed to the dominant role of the advertiser in broadcasting that we tend to forget that, initially, the idea of advertising on the air was not even contemplated and met with widespread indignation when it was first tried."

20 *See generally* **Barnouw** 131-34, 157-60.

21 **Archer** 285-86, 361, 363; **Barnouw** 177-78; **Siepmann** 10-11.

22 At the time the Radio Act was passed, "time-selling stations were still a minotiry; the climax of a struggle between commercial and noncommercial interests lay ahead." **Barnouw** 200; *see also id.* at 202-03; **Siepmann** 10 ("[I]n 1929 the National Association of Broadcasters adopted 'Standards of Commercial Practice,' which specifically barred commercial announcements from the air between the hours of seven and eleven in the evening.").

Given this rather chaotic background, it is not surprising that the legislative history of the Radio Act casts little light on the precise question presented by this case. An early version of the Act, which was passed by the Senate, gave the regulatory body power to "regulate radio stations where a charge is made to listeners,"[23] but this provision was subsequently deleted in conference without explanation.[24] The problem of authority to license direct-charge broadcasting was mentioned only briefly on several occasions during the floor debates on the Radio Act. The most extensive discussion of the question was offered by Senator Dill, sponsor of the Senate bill and Chairman of the Conference Committee:

> Mr. WALSH of Massachusetts. A Representative from New York has introduced in the House a bill to prevent a radio-braodcaster from charging the public for listening in. It is claimed that the possible result of this legislation may be the charging of a fee to listeners. . . . Is there any provision in this bill that permits that to be done?

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[23] **S. Rep.** No. 772, 69th Cong., 1st Sess. 3 (1926).

[24] The portion of the Conference Report which deals with the relevant section of the bill states:

> The jurisdiction conferred in this paragraph is substantially the same as the jurisdiction conferred upon the commission by section 1(c) of the Senate amendment. The important change from the provision of the Senate amendment is that while under the Senate bill this original jurisdiction was vested permanently in the commission, the jurisdiction is by this compromise . . . limited to one year in time.

H. Rep. No. 1886, 69th Cong., 2d Sess. 17 (1927); **S. Doc. 200**, 69th Cong., 2d Sess. 17 (1927).

> Mr. DILL. . . . [T]he commission would have the power to permit or prohibit the use of such apparatus if it so desired, but. . .in my judgment, Congress should not pass a law that would prevent a broadcasting station from so equipping itself that people could not listen to its programs unless they had a certain kind of receiving set.
>
> . . . .
>
> . . .[H]ere in the United States we have built up a free system of broadcasting and reception, and it has thrived. . . . I do not believe, with the condition[s] existing, that any broadcasting station can hope to prosper if it attempts to set up a method by which it would charge the listener in; but I know of no reason why the Congress should interfere with that kind of private business any more than it should interfere with any other kind of private business.

(68 CONG. REC. 2880-81 (1927).) The bill prohibiting direct charges was never passed, and further references to pay broadcasting during the debates were sparse and inconclusive; in most of these discussions, the principal concern seems to be the possibility that large chain broadcasting organizations would obtain monopoly power, through patent licensing agreements or other devices, and use pay broadcasting schemes to extract monopoly profits from the public. *See generally* 68 CONG. REC. 2576-77, 2580, 3033-34, 4149 (1927). In the years intervening between the passage of the Radio Act of 1927 and the issuance of the Commission's *Fourth Report* on subscription television, Congress has, on occasion, been confronted with the suggestion that the present Act authorizes the Commission to license

direct-charge broadcasting services,[25] but no legislation restricting the broad mandate of the original Act has been forthcoming.

Thus, we are unable to agree that the Communications Act absolutely precludes the Commission from approving a system of direct charges to the public as a means of financing broadcasting services. Rather, the Act seems designed to foster diversity in the financial organization and *modus operandi* of broadcasting stations as well as in the content of programs, and we feel that the Commission did not exceed its authority in concluding that subscription television is entirely consistent with these goals.

B. Rate Regulation and Licensing Power

Petitioners seek to negate the broad sweep of the Communications Act by asserting that the Commission lacks the authority to regulate the rates charged by STV operators, and that the absence of such authority reflects Congress' intent to prevent the Federal Communications

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[25] *See, e.g., Fourth Report,* 15 F.C.C. 2d at 598-99; *Second Report on Subscription Television,* **16 P&F Radio Reg. 1539** (1957); 98 **Cong. Rec. 9032-33** (1952). The proceedings leading up to the instant case reflect Congress' inability to agree on limitations of the Commission's power in this area. On September 12, 1968, the day after the House Committee on Interstate and Foreign Commerce passed its resolution urging the Commission to defer action on STV (*see* part I, *supra*), nine members of the Commerce Committee sent a letter to the Commission which stated, in part, that the resolution "represents the thinking of the barest majority of those present at the Commerce Committee hearing" and "does not represent a mandate to the Commission." The letter concluded: "In our opinion, the failure of the FCC to act promptly to decide the 13-year-old rulemaking proceeding on subscription television would be inconsistent with your responsibilities imposed by the Administrative Procedure Act and contrary to the public interest. . . ." *Fourth Report,* 15 F.C.C. 2d at 471-72.

Commission from authorizing direct-charge broadcasting. The contention that the Commission lacks rate-making authority for over-the-air STV is predicated on the structure of the statute: the Communications Act distinguishes between communications "common carriers" and "broadcasting" operators, providing the Commission with explicit authority to establish tariffs for the former but not for the latter. *See* 47 U.S.C. §§ 201, 203 (1964). However, we need not reach the difficult question of whether Commission power to establish rates for broadcasting services is implicit in some provisions of title III, since we are unable to agree with petitioners' interpretation of the role which rate-making authority plays in the Communications Act.

Federal control over telephone and telegraph evolved earlier than did regulation of radio broadcasting, and, in its early forms, it encompassed supervision of the rates charged by companies providing service.[26] Yet, with this model of common carrier treatment for a communications service available in 1927, Congress elected to establish a less rigorous system of federal control for broadcasting. The significance of this differential treatment was noted by this court in *Pulitzer Publishing Co. v. FCC*, 68 U.S. App. D.C. 124, 126, 94 F.2d 249, 251 (1937):

> [W]e have never said that a radio broadcasting station is a public utility in the sense in which a railroad is a public utility. Generally speaking, that term comprehends any facility employed in rendering quasi public service such as waterworks, gas works, railroads, telephones, telegraphs, etc. The use and enjoyment of such facilities the public has the legal right to demand; but its right to the use and enjoyment of the facilities of a privately owned radio station is of a much more limited character.

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[26] *See* 36 Stat. 539, 544-46 (1910).

> . . .[T]he power of Congress has not yet been extended to the point of fixing and regulating the rates to be charged by the licensee or the establishment of rules requiring it to serve alike the entire public in the use of its facilities.

See also FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 474 (1940). In short, we think that it is fair to infer that the differential treatment accorded to communications common carriers and radio broadcasters in the Communications Act reflects Congress' belief that commercial broadcasting is not a natural monopoly which creates the same kinds of risks that a telephone system does. Rather, Congress apparently believed that once the clear dangers of combinations in restraint of trade were removed, competition among those providing broadcasting services in a given area would best protect the public interest. It is also significant that in both the Radio Act of 1927[27] and the present version of the Communications Act,[28] the principal method which Congress provided for combatting anticompetitive practices is regulation through the licensing process—a method which the Commission deemed sufficient to prevent any abuses of economic power by STV operators. See *Fourth Report,* 15 F.C.C.2d at 548, 596-97.

We approve the Commission's conclusion that it was not called upon to decide whether, or in what circumstances, its licensing regulatory functions might include surveillance or control over rates charged for services. The need for such control would presumably be rooted in developments in the market which demonstrated that STV had been granted a monopolistic or "quasi-monopolistic" position, in which the competition of ordinary TV or other services was not

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[27] *See* 44 Stat. 1162, 1168-69 (1927).

[28] *See* 47 U.S.C. §§ 313-14 (1964).

effective to prevent abuse. On the basis of the rates charged in the Hartford experiment, the FCC concluded there was no likelihood of rate abuse. Appellants claim that these rates were kept artificially low in order to obtain a good climate for general approval of STV. Perhaps so, but the Commission was entitled to take into account the facts as they now exist, without ranging into such speculation. If and when the premises of its regulatory approach change, the Commission can and should consider the issues involved. *American Airlines, Inc. v. CAB*, 123 U.S. App. D.C. 310, 359 F.2d 624, 633 (en banc), *cert. denied*, 385 U.S. 843 (1966). Its predictions as to the probable course of rates and existence of meaningful competition are certainly not unreasonable; and it is equally certain that the FCC was not required to stake out at this time the techniques and methods it might desire to use in future circumstances that have not yet and may not ever take shape. "In a statutory scheme in which Congress has given an agency various bases of jurisdiction and various tools with which to protect the public interest, the agency is entitled to some leeway in choosing which jurisdictional base and which regulatory tools will be most effective in advancing the Congressional objective." *Philadelphia Television Broadcasting Co. v. FCC*, 123 U.S. App. D.C. 298, 300, 359 F.2d 282, 284 (1966).

C. The Question of Arbitrariness

Petitioners advance a separate but related challenge to the Commission's treatment of the rate regulation question. Petitioners contend that, even if the authorization of STV was within the scope of the Commission's power, its action in the *Fourth Report* was arbitrary and capricious because the Commission failed to set forth adequate reasons for its decisions to employ regulatory measures less drastic than rate-making, and to avoid detailed inquiry into the question of whether it possesses the authority to establish rates.

In essence, petitioners' argument rests on the premise that STV operations will be monopolies similar to the public utilities which have traditionally been subject to rate regulation (Brief for Petitioners at 41). In turn, this postulate apparently rests on the assumption that the relevant product market is the television *station,* and that a finding of any other product market would be so unreasonable as to be capricious.[29] The question of market definition is hardly that simple. Within the confines of the *Fourth Report,* there are statements by various parties suggesting a number of other possible product markets affecting STV: all entertainment available in a given area; all television programming available in the area; all programs or performances of a given type, such as motion pictures or sporting events, which could be seen in live performances and other media; subcategories within program types, such as films less than two years old or athletic events featuring home town teams; and unique individual programs. *See generally* 15 F.C.C. 2d at 474-88, 494-509. Obviously, entertainment is an industry in which antitrust concepts such as product market and cross-elasticity of demand[30] are exceptionally difficult to apply; the inquiry is further

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[29] Brief for Petitioners at 41 (emphasis in original):

> The Commission urges that rate regulation is unnecessary since: "We believe that the market place will regulate charges that are paid . . . ." Yet, it can fairly be asked: What market place? The Commission has limited pay television to *only one station* in each city with five television allocations. Under these conditions, it is simply fallacious to argue that a "market place" exists, the operation of which would protect the public. There is no "market place" when there is a government-authorized monopoly.

[30] *See, e.g.,* United States v. Columbia Pictures Corporation, 189 F. Supp. 153, 183-92 (S.D. N.Y. 1960); **Section of Antitrust Law of the American Bar Association, Antitrust Developments 1955-1968** at 66-70 (1968).

complicated by the fact that the copyright law operates to create some permissible monopolies within the general area.

In light of the extensive discussion devoted to these topics in the *Fourth Report* and the considerations enumerated in the preceding section, we are not prepared to hold that the Commission was arbitrary and capricious in determining that a substantial amount of economic competition would exist between STV and the other forms of entertainment and enlightenment available in the community.[31] Courts should be very reluctant, we think, to declare that free market forces must be supplanted by rate regulation when neither Congress nor the agency administering the area has found that such regulation is essential.

IV. THE FIRST AMENDMENT AND EQUAL PROTECTION ISSUES

Petitioners also challenge the propriety of the Commission's actions on the grounds that the authorization of STV constitutes an invidious discrimination against indigent persons who will be unable to afford STV equipment or fees, and that the program restrictions imposed upon STV operations constitute an impermissible restraint on free speech

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[31] The Commission devoted considerable attention to the likelihood that STV will compete not only with free television, but also with motion picture theatres and other "box office" attractions. *See* 15 F.C.C. 2d at 474-88, 497, 508-09.

violative of section 326 of the Communications Act[32] and the first amendment to the Constitution. At the outset, there is some doubt whether petitioners possess the requisite standing to raise these issues. We note, for example, that in the proceedings before the Commission petitioner Joint Committee Against Toll TV proposed and urged adoption of program restrictions which were quite similar to the ones which they now attack (J.A. 19-24), and that organizations vitally interested in free speech supported approval of STV as a means of promoting diversity of expression (*see* part IVB, *infra*). Similarly, it is significant that the Commission concluded from the Hartford experiment that in at least one instance STV subscribers were able to observe a major sporting event in their homes at a per capita cost which was substantially less than the prices being charged for viewing the same event on closed circuit television in neighborhood theaters (15 F.C.C. 2d at 485). At the same time, we are familiar with the line of authority cited by petitioners which supports an expansive interpretation of the standing requirement when

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[32] 47 U.S.C. § 326 (1964):

> Nothing in this chapter shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

A logical extension of petitioners' constitutional arguments could well render any form of direct-charge broadcasting unconstitutional. Thus, it could be argued that rules against siphoning of programs, talent, and audiences are required in order to prevent STV from damaging free television and imposing impermissible hardship on poor people; but any rules against siphoning would violate the first amendment, and thus the Commission and Congress are without power to approve direct-charge broadcasting.

challenges to the legality of administrative action are made;[33] moreover, we think that petitioners' long and vociferous opposition to the establishment of STV, both here and before the Commission, is evidentiary of "concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions." *Baker v. Carr*, 369 U.S. 186, 204 (1962); *see also Flast v. Cohen*, 392 U.S. 83, 99 (1968). Finally, since we have determined that petitioners' constitutional claims must fail on the merits, we shall assume without deciding that they possess the requisite standing.

A. Discrimination Against the Poor

Petitioners rely on several findings in the *Fourth Report* to support their contention that the Commission's authorization of nationwide STV will result in unconstitutional discrimination against people in low income groups. Specifically, they point to data from the Hartford experiment which showed that less than two percent of all subscribers had incomes in the range of $0-$3,999 (15 F.C.C. 2d at 493), while nearly thirty percent of the national population in 1964 had incomes of less than $4,000; thus, they conclude that the

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[33] The leading case is FCC v. Sanders Brothers Radio Station, 309 U.S. 470, 477 (1940), where the Supreme Court stated that in enacting the standing provisions of the Communications Act, 47 U.S.C. § 402 (1964), Congress "may have been of the opinion that one likely to be financially injured by the issue of a license would be the only person having a sufficient interest to bring to the attention of the appellate court errors of law in the action of the Commission . . . ." The Court held that the standing thus conferred encompassed "any relevant question of law in respect of the order of the Commission." *See also* Office of Communication of the United Church of Christ v. FCC, No. 19,409 (D.C. Cir., June 20, 1969); National Association of Securities Dealers, Inc. v. SEC, No. 20,164 (D.C. Cir., April 30, 1969) (slip op. at 24-36; Chief Judge Bazelon concurring).

authorization of STV is "systematic discrimination" against thirty percent of our citizens.[34] We need not reach the question of whether the concepts of equal protection applicable to the federal government by implication from the due process clause of the fifth amendment (*cf. Bolling v. Sharpe*, 347 U.S. 497 (1954)) are any different from the concepts of equal protection applicable to the states under the fourteenth amendment; by any accepted standard of equal protection, we find the petitioners' claim insubstantial.

Since the Commission promulgated a number of rules designed to protect free television from economic incursions by STV—rules which we think are reasonable and amply supported by the record— we must confine our inquiry to the proposition that any form of pay broadcasting would, by itself, be discriminatory against the indigent. We must also assume that the charges imposed by STV operators will not be exorbitant, since we have affirmed the Commission's determination that rate regulation is not presently needed to prevent monopoly profits. Thus, unless there is some factor which serves to distinguish broadcasting from other endeavors which are subject to federal regulation, we are being asked to render a decision which would go far toward establishing the rule that every service provided by a regulated industry must be made available to all citizens on the basis of their ability to pay. Such a result would clearly be a constitutional innovation that we are unwilling to make; and we are not convinced that the

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[34] As a matter of statistical technique, we have some doubts about the reliability of figures obtained by comparing data taken from the Hartford area to data taken from the whole nation; in theory, it is possible that the Hartford area contains a substantially smaller proportion of people in the low income levels than does the nation as a whole, and that as a result the two percent figure is misleading. For present purposes, however, we shall disregard this potential discrepancy.

subject of television broadcasting has unique features distinguishing it from comparable regulated industries.

The equal protection cases cited by petitioners bear scant resemblance on their facts to this controversy; rather the cases involve poll taxes (*Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966)) and the administration of criminal justice (*Griffin v. Illinois*, 351 U.S. 12 (1956)). Petitioners attempt to relate these cases and their progeny to subscription television by arguing that "in order to fulfill their citizenship requirements, or, indeed, to effectively achieve their rights, the poor must have access to the mass media" (Brief for Petitioners at 46). We think that this doctrinal bridge is far too insubstantial to bear the weight of petitioners' argument, and that their analysis fails to take account of the realities which the Commission considered in authorizing STV.

The public's access to the broadcast media has never been wholly free; at minimum, it has been necessary to procure and maintain the necessary apparatus for receiving broadcasts, and this burden necessarily weighs heaviest on those with least resources. Moreover, any "deprivation" of access to the broadcast frequencies which may result from the Commission's approval of STV will almost certainly be slight. At most, one out of five stations serving a given community will be devoted to STV under the rules promulgated by the Commission; this station will be required to carry at least twenty-eight hours of free programming per week. The Commission also adopted detailed programming restrictions which are designed to prevent the more popular kinds of free programs from migrating to subscription television. At the same time, the Commission found that the authorization of STV may create benefits for all citizens which could well offset any deprivation. Thus, in some communities approval of STV operations could result in the opening of a new station rather than the conversion of an existing free station; in this situation, there would

be a net gain in the amount of free broadcasts because of the STV operators' obligation to provide free programs (15 F.C.C. 2d at 494). Similar considerations will be present when an existing station that is in serious financial difficulties manages to survive by converting to subscription operations (*Id.*). Subscription television may also make available to a larger viewing public entertainment which would otherwise be unavailable for reasons of distance, lack of seating space, the desire of promoters to protect their gate receipts, or because the per capita cost of STV viewing is less than attendance at a "live" event. *Cf.* 15 F.C.C. 2d at 484-85. Finally, there is also the possibility that competition from STV will spur the free broadcasting networks and stations to make substantial improvements in their services, resulting in an overall gain in the quality of television programming (15 F.C.C. 2d at 505). In short, we believe that the Commission gave full and fair consideration to the potential impact of STV on poor people and free television, and that its findings, conclusions, and rules on these issues were reasonable.

B. The Program Restrictions and the First Amendment

Petitioners' final contention is that the program restrictions which the Commission established in order to prevent STV from siphoning programs, talent, and audiences from free broadcasting are repugnant to section 326 of the Communications Act and the first amendment of the Constitution as a prior restraint on free speech. In general, these program restrictions provided that: (1) no advertising could be broadcast during subscription operations, except for announcements promoting STV programs; (2) feature films could not be offered which had been generally released more than two years prior to the broadcast date, with several exceptions; (3) sports events which had been regularly broadcast live on free television in the two

years preceding their subscription broadcast could not be shown on STV; (4) no series program with interconnected plots or substantially the same cast of characters could be offered on a subscription basis; (5) not more than ninety percent of the total STV broadcasting hours could consist of feature films and sports events combined. 15 F.C.C. 2d at 597-98.

At the outset, it is appropriate to note the extreme difficulty and delicacy of the tasks which the first amendment imposes on the Federal Communications Commission. The Commission is charged with administering a scarce communications resource, the broadcast spectrum, in such a manner that the great objectives incorporated into the first amendment are realized and debate on public issues is "uninhibited, robust, and wide-open." *New York Times Co. v. Sullivan,* 376 U.S. 254, 270 (1964). Thus the Commission must seek to assure that the listening and viewing public will be exposed to a wide variety of "social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 390 (1969). In seeking to provide the broadcasting media with the diversity demanded by the first amendment, however, the Commission must avoid the perils of both inaction and overzealousness—or abdication which would allow those possessing the most economic power to dictate what may be heard, and of censorship which would allow the government to control the ideas communicated to the public. The need to make choices of this kind requires the Commission to take some cognizance of the kind and content of programs being offered to the public.[35] Further, the Commission must

[35] *See, e.g.,* Black Hills Video Corp. v. FCC, 399 F.2d 65 (8th Cir. 1968); Buckley-Jaeger Broadcasting Corp. of California v. FCC, __ U.S. App. D.C. __, 397 F.2d 651 (1968); Buckeye Cablevision, Inc. v. FCC, 128 U.S. App. D.C. 262, 387 F.2d 220 (1967); Bay State Beacon, Inc. v. FCC, 84 U.S. App. D.C. 216, 171 F.2d 826 (1948).

be cautious in the manner in which it acts; regulations which are vague and overbroad create a risk of chilling free speech, while rules which are too finely drawn will arouse judicial suspicion that they are designed to suppress uncongenial ideas. *Cf. Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 395-96 (1969). We are convinced that the Commission acted within these limits in promulgating its rules for subscription television.

In *Banzhaf v. FCC,* U.S. App. D.C. , , 405 F.2d 1082, 1101-1103 (1968), we established several tests which can aid in determining whether Commission rulings and orders are in conflict with the first amendment. The first consideration mentioned in *Banzhaf* is whether the rulings ban speech, and, as the petitioners point out, the STV restrictions prevent subscription licensees from broadcasting certain kinds of programs. This characterization of the STV rules ignores their context and purpose, however; it seems obvious that the Commission sought only to insure the continuing economic vitality of free television and not to affect the ideas which could be presented on either free or subscription television. Thus, when the net effect of the program restrictions is considered, it seems quite likely that the public in STV areas will receive more rather than less diversity of expression in its television programming. It is significant that the American Civil Liberties Union and the Americans for Democratic Action urged the Commission to approve STV as a means of opening new avenues of speech, and suggested regulations which were similar in some respects to those ultimately adopted in the *Fourth Report* in order to assure that existing economic forces were directed toward achieving maximum diversity of expression. *See generally* 15 F.C.C. 2d at 516, 526, 546-67, 554-55, 575. Here, as in *Banzhaf,* the likely result of the Commission's action is to provide the public with additional

information and ideas rather than repressing existing sources. *See* 405 F.2d at 1103.

In addition, we note that the restrictions now being challenged deal with categories of speech which are, if anything, farther from the central concerns of the first amendment than those at issue when comparable rulings have been upheld by the courts. In *Red Lion,* the Supreme Court upheld against first amendment attack the "fairness doctrine," which restricted broadcasting stations' control over political statements–speech which is certainly the core of the first amendment guaranty. Similarly, our opinion in *Banzhaf* upheld restrictions which required broadcasters to allocate time for opponents of cigarette advertising, a matter which was characterized as a public health issue. We think that the STV rules create far less risk of diminishing the debate on vital public issues. Finally, the Commission found that STV would be a beneficial supplement to present television offerings, provided that neither service could acquire sufficient economic power to drive the other from the market-place. The program restrictions are designed to preserve this balance and to insure against programming duplication; thus it can be said here, as in *Banzhaf,* that "[e]ven if some valued speech is inhibited by the ruling, the First Amendment gain is greater than the loss." 405 F.2d at 1102.

Since our review of the petitioners' contentions reveals no error in the Commission's determinations, the *Fourth Report and Order* must be

Affirmed.

APPENDIX B

The Constitution

AMENDMENT [I]

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Communications Act of 1934

Section 3(o). "Broadcasting" means the dissemination of radio communications intended to be received by the public, directly or by the intermediary of relay stations.

Section 301. It is the purpose of this Act, among other things, to maintain the control of the United States over all the channels of interstate and foreign radio transmission; and to provide for the use of such channels, but not the ownership thereof, by persons for limited periods of time, under licenses granted by Federal authority, and no such license shall be construed to create any right, beyond the terms, conditions, and

periods of the license. No persons shall use or operate any apparatus for the transmission of energy or communications or signals by radio (a) from one place in any territory or possession of the United States or in the District of Columbia to another place in the same territory, possession, or district; or (b) from any state, territory, or possession of the United States, or from the District of Columbia to any other state, territory, or possession of the United States; or (c) from any place in any state, territory, or possession of the United States, or in the District of Columbia, to any place in any foreign country or to any vessel; or (d) within any state when the effects of such use extend byond the borders of said state, or when interference is caused by such use or operation with the transmission of such energy, communications, or signals from within said state to any place beyond its borders, or from any place beyond its borders to any place within said state, or with the transmission or reception of such energy, communications, or signals from and/or to places beyond the borders of said state; or (e) upon any vessel or aircraft of the United States; or (f) upon any other mobile stations within the jurisdiction of the United States, except under and in accordance with this Act and with a license in that behalf granted under the provisions of this Act.* * *

Section 303. Except as otherwise provided in this Act, the Commission from time to time, as public convenience, interest, or necessity requires, shall –

(a) Classify radio stations;

(b) Prescribe the nature of the service to be rendered by each class of licensed stations and each station within any class;

(c) Assign bands of frequencies to the various classes of stations; and assign frequencies for each

individual station and determine the power which each station shall use and the time during which it may operate;

(d) Determine the location of classes of stations or individual stations;

(e) Regulate the kind of apparatus to be used with respect to its external effects and the purity and sharpness of the emissions from each station and from the apparatus therein;

(f) Make such regulations not inconsistent with law as it may deem necessary to prevent interference between stations and to carry out the provisions of this Act: Provided, however, that changes in the frequencies, authorized power, or in the times of operation of any station, shall not be made without the consent of the station licensee unless, after a public hearing, the Commission shall determine that such changes will promote public convenience or interest or will serve public necessity, or the provisions of this Act will be more fully complied with;

(g) Study new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest;

(h) Have authority to establish areas or zones to be served by any station;

(i) Have authority to make special regulations applicable to radio stations engaged in chain broadcasting;

(j) Have authority to make general rules and regulations requiring stations to keep such records of programs, transmissions of energy, communications, or signals as it may deem desirable;

* * * * *

Section 326. Nothing in this Act shall be understood or construed to give the Commission the power of censorship over the radio communications or signals transmitted by any radio station, and no regulation or condition shall be promulgated or fixed by the Commission which shall interfere with the right of free speech by means of radio communication.

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No. 932

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

NATIONAL ASSOCIATION OF THEATRE OWNERS and JOINT COMMITTEE AGAINST TOLL TV, *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA
and
ZENITH RADIO CORPORATION and TECO, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS ZENITH RADIO CORPORATION and TECO, INC. IN OPPOSITION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 932

NATIONAL ASSOCIATION OF THEATRE OWNERS and JOINT COMMITTEE AGAINST TOLL TV, *Petitioners,*

v.

FEDERAL COMMUNICATIONS COMMISSION and UNITED STATES OF AMERICA

and

ZENITH RADIO CORPORATION and TECO, INC., *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR RESPONDENTS ZENITH RADIO CORPORATION and TECO, INC. IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A-1 to A-30) is not yet reported. The Federal Communications Commission's *Fourth Report and Order*

authorizing subscription television and prescribing the rules for its operation is reported at 15 F.C.C.2d 466 (1968).

QUESTIONS PRESENTED

1. Whether the Communications Act empowers the Federal Communications Commission to authorize subscription television (STV) upon determining that it would be in the public interest to permit a per-program fee to be charged to those subscribers electing to pay for any such program, but only under limitations designed to assure that STV service will supplement and not supplant the conventional (advertising-sponsored) service.

2. Whether the Commission's order authorizing STV illegally discriminates against the poor.

STATEMENT

The material facts are set forth in the petition and in the Brief in Opposition of the respondents Federal Communications Commission and the United States of America.

ARGUMENT

1. The primary reason advanced by petitioners for review of the decision below is that the question of the Federal Communications Commission's power to authorize subscription television as a supplement to conventional (advertising-financed) television has "national importance" (Pet. 11). However important the question appeared at the Court of Appeals level, it does not warrant review by this Court of the unanimous decision reached below. The well-reasoned opinion of the Court of Appeals reflects careful consideration and exposition of all relevant factors, is bottomed

on well-established principles of statutory construction and is fully in accord with decisions of this Court construing the Commission's broad statutory mandate.

In *United States* v. *Southwestern Cable Co.*, 392 U.S. 157 (1968), and *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367 (1969), the Court reaffirmed an unbroken line of authorities extending over a thirty-year period to the effect that, absent specific limitation or exception in the Communications Act, the Commission, under the general criterion of public interest, convenience and necessity, has wide discretion in choosing among competing demands for utilization of broadcast frequencies.[1] With these decisions before it, the court below readily approved the Commission's action in authorizing STV as a supplemental service. There is no reason for this Court to undertake plenary review of administrative action which is so clearly within the ambit of the Commission's powers as repeatedly and recently interpreted by this Court.

Petitioners contend (Pet. 11-14) that, because of the novelty of the new service,[2] the Commission is with-

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[1] See, e.g., Federal Communications Commission v. Pottsville Broadcasting Co., 309 U.S. 134, 138 (1940); National Broadcasting Co. v. United States, 319 U.S. 190 (1943); United States v. Storer Broadcasting Co., 351 U.S. 192 (1956).

[2] The Court of Appeals pointed out, however, that the authorization of a subscription service is not without precedent (Pet. App. A-12). See Functional Music Inc. v. Federal Communications Commission, 107 U.S. App. D.C. 34, 274 F. 2d 543 (1958), *cert. denied*, 361 U.S. 813 (1959); In the Matter of Muzak Corporation, 8 F.C.C. 581 (1941). Moreover, the decision in Connecticut Committee Against Pay TV v. Federal Communications Commission, 112 U.S. App. D.C. 248, 301 F. 2d 835, *cert. denied*, 371 U.S. 816 (1962), which approved Commission authorization of the trial

out power to license subscription television in the absence of a specific affirmative grant of such power in the Communications Act. This contention rests on a misreading of the Act which, as stated by the Court of Appeals, confers a "broad grant of general licensing authority" upon the Commission (Pet. App. A-10). Thus, Section 307(a)[3] authorizes the Commission, subject to limitations not pertinent here, to grant a station license to any applicant "if public convenience, interest or necessity will be served." Sections 303(a) and (b)[4] empower the Commission to classify stations and to prescribe the nature of the service rendered by each class of station and each station within any class. Congress, in Section 303(g), also directed the Commission, "[e]xcept as otherwise provided in this chapter" to "[s]tudy new uses for radio, provide for experimental uses of frequencies, and generally encourage the larger and more effective use of radio in the public interest."[5] Since there is no provision in the Communications Act either prohibiting a service

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of an STV service, necessarily found statutory support for the Commission's power to authorize a system requiring the payment of fees by the public. The petition for writ of certiorari filed by the theatre interests in that case—which petition was denied by this Court—presented specifically the questions (1) whether the Commission has the statutory authority to authorize a television system under which members of the public are required to pay a fee in order to view the programs presented, and (2) whether, before authorizing such a system, the Commission must first determine the applicability of its rate-regulation authority. The Solicitor General, in opposing certiorari, advised the Court that, in his view, the question of the Commission's power to authorize any kind of subscription service, whether on a trial or a regular basis, was necessarily raised by the petition for certiorari (Gov't Brief in Opposition to Certiorari, Oct. Term, 1962, No. 161, p. 12, n. 8).

[3] 47 U.S.C. § 307(a).

[4] 47 U.S.C. §§ 303(a), (b).

[5] 47 U.S.C. § 303(g).

requiring the direct payment of a fee by the public or limiting the use of radio frequencies to those services which were common when the law was enacted, these provisions, without more, afford ample basis for the Commission's action and a full answer to petitioners' attack upon it.

The Communications Act does not itemize the types of radio service which the Commission is authorized to license or the sources of economic support, and neither the statute nor the cases interpreting it provide a ground for petitioners' assertion that such specific authorization should be required in the case of STV. For, as this Court has declared, "Congress was acting in a field of regulation which was both new and dynamic." Its "dominant characteristic . . . was the rapid pace of its unfolding." *National Broadcasting Co.* v. *United States, supra,* 319 U.S. at 219. Congress "did not frustrate the purposes for which the Communications Act of 1934 was brought into being by attempting an itemized catalogue of the specific manifestations of the general problems for the solution of which it was establishing a regulatory agency." Instead, it defined broad areas for regulation under governing standards (*id.* at 219-20) and, recognizing that the Commission's "authority covers new and rapidly developing fields" (*United States* v. *Storer Broadcasting Co., supra,* 351 U.S. at 203), affirmatively directed the Commission to encourage new uses for radio (47 U.S.C. § 303(g)), and clothed it with wide discretion in choosing among the competing demands for frequencies. As the Court stated in *United States* v. *Southwestern Cable Co., supra,* 392 U.S. at 172:

> "Nothing in the language of § 152(a), in the surrounding language, or in the Act's history or pur-

> poses limits the Commission's authority to those activities and forms of communication that are specifically described by the Act's other provisions. The Section itself states merely that the 'provisions of [the Act] shall apply to all interstate and foreign communication by wire or radio . . . .' Similarly, the legislative history indicates that the Commission was given 'regulatory power over all forms of electrical communication.' . . . [I]t seems to us that it was precisely because Congress wished 'to maintain through appropriate administrative control, a grip on the dynamic aspects of radio transmission,' . . . that it conferred upon the Commission a 'unified jurisdiction' and 'broad authority'."

Thus, the court below was plainly correct in holding, upon the basis of this Court's decisions dealing with the Commission's power as well as pertinent legislative history, that: "the Act seems designed to foster diversity in the financial organization and *modus operandi* of broadcasting stations as well as in the content of programs, and we feel that the Commission did not exceed its authority in concluding that subscription television is entirely consistent with these goals" (Pet. App. A-17).

2. Petitioners insist (Pet. 15) that a determination as to whether the regulation of rates of broadcasters is permissible under the Communications Act is critical to the interpretation of the Commission's authority to authorize subscription television. The court below noted that the statute and the legislative history made it clear that insofar as broadcasting service is concerned, Congress believed in the desirability of effective competition to protect the public interest and left it to the Commission to foster such competition. Therefore, Congress did not make it obligatory for the

Commission to impose rate regulation for any type of broadcast service. The Commission took the reasonable position that it is unrealistic to anticipate excessive charges from a new service which, in order to survive, must obviously attract subscribers who have many alternatives. It expressly limited STV to communities served by at least four other Grade A signals from conventional or "free" television stations.[6] A subscription station thus has to compete vigorously to induce viewers of "free" television to pay money in order to view STV programs. It will also face the price competition of petitioners and other exhibitors of "box office" attractions such as first-run motion pictures, sports events and productions of the legitimate theatre. There will be ample time after the system is established for the Commission to determine whether its safeguards designed to foster competition are inadequate and whether the panopoly of rate regulation is required. If at that time it should be concluded that modification of the statute is necessary to augment the Commission's power in the rate regulation field, there will be ample opportunity to obtain such modification.

3. Petitioners assert (Pet. 18-22) that the program restrictions placed on subscription television amount to a denial of the STV broadcaster's right of free speech in violation of Section 326 of the Communications Act[7] and the First Amendment to the Constitution, and that the invalidity of those restrictions demonstrates the lack of authority in the Commission to authorize STV operations. These theatre interests are

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[6] FCC Rules and Regulations, 47 C.F.R. § 73.642(a).

[7] 47 U.S.C. § 326.

in the anomalous position of seeking to prevent STV service entirely by claiming a denial of the right of free speech of broadcasters who wish to furnish this service.[8] Their present contention is also surprising in view of the opposition maintained before the Commission by Petitioner Joint Committee Against Pay TV. It urged the Commission, in the event it authorized STV, to prescribe limits on the amount of time that could be devoted to motion picture features films on STV and to exclude from STV sporting events carried on conventional television within five years, as well as similar limitations "which we believe appropriate if any authorization is to be made at the present time."[9] The Joint Committee insisted that such restrictions are justified on the ground that they "are calculated to restrict Pay-TV from siphoning program material which historically has been made available on free television."[10]

The rules which the Commission has prescribed for subscription television provide in effect that STV will do what it was designed to do, namely, bring to the public a supplementary service in the nature of "box office" attractions for which the public now pays an admission charge in theatres, arenas, concert halls, etc., and not programs merely duplicative of those now carried to home screens by conventional

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[8] This anomaly is heightened by the fact that California legislation prohibiting STV, as initiated by theatre interests, was held unconstitutional as a denial of free speech. Weaver v. Jordan, 64 Cal. 2d 235, 49 Cal. Rptr. 537, *cert. denied*, 385 U.S. 844 (1966).

[9] Comments of Joint Committee Against Toll TV, October 10, 1966, p. 52, see *Fourth Report and Order*, pars. 282, 288-90, 302-03, 306.

[10] Comments, *supra* note 9, at 59.

television. Thus, the rules prohibit advertising during subscription broadcasts and attempt to confine the STV broadcaster during his subscription periods to programs which are not normally available to the advertising-financed broadcaster. Stations which are authorized to broadcast STV programs may, during non-subscription periods, broadcast the same type of programs and commercials as other stations. In adopting the subscription television rules, the Commission was thus performing one of its most important functions—the promotion of diversity in the broadcast programs available to the public. By adding subscription revenues as a new economic resource for broadcasting, while at the same time adopting measures to assure the co-existence of the two systems, the Commission added a new dimension to its efforts to diversify service.

Under Section 303(a) of the Act the Commission may classify radio stations and under Section 303(b) it may "[p]rescribe the nature of the service to be rendered by each class of licensed stations and each station within any class." The Commission's authority to consider the content of program service in allocating frequencies and adopting rules implementing its allocations, provided this is done reasonably and in accordance with the statutory mandate of public interest, convenience and necessity, has been repeatedly upheld against charges of censorship.[11] The decision below in

[11] See, e.g., Great Lakes Broadcasting Co. v. Federal Radio Commission, 59 App. D.C. 197, 37 F. 2d 993, 995, *cert. dismissed*, 281 U.S. 706 (1930); Simmons v. Federal Communications Commission, 83 U.S. App. D.C. 262, 169 F. 2d 670, *cert. denied*, 335 U.S. 846 (1948); Henry v. Federal Communications Commission, 112 U.S. App. D.C. 257, 302 F. 2d 191, *cert. denied*, 371 U.S. 821 (1962).

the instant case is fully in accord with *National Broadcasting Co.* v. *United States,* 319 U.S. 190 (1943), and *Red Lion Broadcasting Co.* v. *Federal Communications Commission,* 395 U.S. 367 (1969).

4. Finally, petitioners assert (Pet. 23-24) that the establishment of subscription television constitutes an arbitrary and unconstitutional discrimination against low income groups. They imply that the Court of Appeals failed to give this contention the effect it warranted because it was deterred by "the novelty of the question" (Pet. 23). It is apparent, however, from reading the opinion below, that the reason the court rejected the contention of discrimination was because, upon analysis, it was found to be "unsubstantial" (Pet. App. A-25-27). In view of the careful rules promulgated by the Commission (with only one of five stations serving a given community allowed to broadcast STV programs, and even that station required to carry a prescribed minimum of "free" programming) any diminution in the quantity of conventional programs will almost certainly be slight. Moreover, it will make available to a large part of the population who desire it the beneficial supplement of subscription programs as well as the advantages of monetary savings and convenience that group viewing of subscription broadcasts affords.

Although theatre owners profess to be concerned about the low-income groups and with saving "free" television, their real concern obviously is that STV will successfully compete with them by bringing certain programs to the public at a much lower per-family cost than the charges exacted for them at the theatres,

specifically, first-run feature films and sports events which can now be seen only on "closed circuit" television in the theatres. Subscription television has the capability to bring to lower-income groups by a relatively low-cost distribution system the only realistic opportunity they may ever have to see a Broadway play on opening night, to enjoy the brilliance of an opera, to sit "ringside" at a heavyweight championship fight, and to watch a movie without cuts to fit a time schedule, without commercial interruptions, and while it is still first-run. STV has the potential of expanding the recreational, cultural and educational opportunities of lower-income and other groups. This is the hope and expectation of the Commission, and the attempt to achieve it is a valid public purpose.

The *Fourth Report and Order,* which was issued 16 years after subscription television proceedings were begun before the Commission, represents a reasoned analysis of the advantages and possible risks of this new service in the light of public interest objectives in the more effective and more diverse use of our television resources. By making a free choice in the open market the American people will decide its future. The contrary arguments of the theatre interests are but an echo of the opposition interposed by vested interests throughout our history to prevent or delay the emergence of a new competitive industry. The Court below was clearly correct in holding that the Commission's action is well within its statutory purview and is supported by adequate public interest findings.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 932

NATIONAL ASSOCIATION OF THEATRE OWNERS, ET AL., PETITIONERS

v.

FEDERAL COMMUNICATIONS COMMISSION, UNITED STATES OF AMERICA, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE UNITED STATES AND THE FEDERAL COMMUNICATIONS COMMISSION IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A–1 to A–30) is not yet reported. The Commission's *Fourth Report and Order* on subscription television is reported at 15 F.C.C. 2d 466.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1969. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Federal Communications Commission has statutory authority to license subscription television.

2. Whether the Commission's licensing of subscription television under its prescribed rules constitutes an unconstitutional discrimination against the poor or impinges on First Amendment rights of free expression.

STATUTE INVOLVED

Pertinent provisions of the Communications Act of 1934 are set forth in Appendix B to the petition (pp. B–1 to B–4).

STATEMENT

On December 12, 1968, the Federal Communications Commission adopted its *Fourth Report and Order* on subscription television service (STV) (15 F.C.C. 2d 466), which established specific rules governing the operation of that service by broadcast stations.[1] Under these rules, one television station in any community with at least five commercial television stations may, upon application, be authorized by the Commission to provide subscription television service. The rules require the station, *inter alia,* to continue to provide free service for 28 hours a week conforming to the Commission's regular television rules,

[1] Subscription television is essentially the transmission in scrambled form of programs which can be received in intelligible form by the use of decoders, a charge is paid to the broadcast station involved.

and to carry certain types of programs now generally provided free to the public. They also prohibit commercial announcements (except relating to other STV programs) during STV operation.[2]

The Commission began its consideration of subscription television in February 1955 when it issued a *Notice of Proposed Rule Making,* 20 Fed. Reg. 935, soliciting the views of interested parties on the question whether the Commission is empowered to authorize subscription television and, if so, whether such authorization would be in the public interest. On October 17, 1957, the Commission issued a *First Report* on subscription television (23 F.C.C. 532), in which it concluded that it has the requisite authority to authorize subscription television service, but that an extensive trial operation governed by specified, detailed conditions and restrictions should first be initiated to determine whether permanent authorization on a general basis would serve the public interest and, if so, with what limitations.[3] The trial operation was ulti-

[2] These STV rules became effective June 12, 1969. They were followed by the adoption of certain technical rules (19 F.C.C. 2d 559) on September 4, 1969. The latter have not been challenged. Applications for STV authorization were accepted after the issuance of the technical rules with the understanding that no application would be granted until 60 days after the court of appeals issued its decision. To date, the Commission has received two applications for approval of technical systems, one of which was submitted by the Zenith Radio Corporation. No STV application has yet been granted.

[3] The *First Report* was followed by two further reports on the subject in 1958 and 1959. *Second Report*, 16 Pike & Fisher R.R. 1539; *Third Report*, 26 F.C.C. 265. The *Second Report* postponed the processing of applications for trial authorizations in light of

mately initiated in Hartford, Connecticut, in 1962. The Commission's authority to grantthis trial authorization was affirmed by the Court of Appeals for the District of Columbia Circuit in *Connecticut Committee Against Pay TV* v. *Federal Communications Commission,* 301 F. 2d 835, certiorari denied, 371 U.S. 816.

During their trial operation in Hartford, respondents Zenith and TECO jointly petitioned for a nationwide STV authorization. On March 24, 1966, the Commission issued a further *Notice of Proposed Rule Making and Notice of Inquiry,* 31 Fed. Reg. 5136, which sought comments on particular questions of authority and policy later considered and resolved in the *Fourth Report.* Based on this inquiry, which studied, *inter alia,* the Hartford experiment and another in Etobicoke, Canada, the Commission ultimately concluded (15 F.C.C. 2d at 483–488) that permanent authorization promised continuing and increased program material different from that available on free television, with a likely emphasis on films and sports. It also found a probability that STV would have its primary appeal among the approximately 54 percent of American families then earning between $4,000 and $9,999 rather than among the 18 percent in higher income levels. The Commission imposed certain pro-

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House and Senate Committee resolutions stating that STV should not be authorized without amendment of the Communications Act, and in light of the pendency of prohibitory legislation. Congress having failed to act, the *Third Report,* adopted a year later, announced the Commission's readiness to consider applications for trial authorizations under slightly revised conditions.

gram restrictions on STV which it concluded would prevent impairment of free television or significant audience, talent, or program siphoning (15 F.C.C. 2d at 504–509).[4]

In addition, the *Fourth Report* required that decoding devices essential for receipt of STV programs be rented rather than sold (15 F.C.C. 2d at 552–553), and prohibited licensees from entering into any agreement or understanding which interfered with or limited their responsibility for determining their rates or charges (15 F.C.C. 2d at 542–544). The Commission concluded that, on the basis of the information currently available to it, there was no reason to impose any other requirements on STV stations beyond the present rules and policies applicable to conventional television broadcasters (15 F.C.C. 2d at 545).

On appeal, petitioners challenged the Commission's statutory power to authorize nationwide over-the-air subscription television service and the Commission's authority to regulate the rates charged by STV operators. Additionally, they argued that subscription television is discriminatory against the poor, and that the program limitations imposed by the Commission con-

[4] These restrictions are: (1) no advertising may be broadcast during subscription operations, except for announcements promoting STV programs; (2) feature films may not be offered which have been generally released more than two years prior to the broadcast date, with several exceptions; (3) sports events which have been regularly broadcast live on free television in the two years preceding their subscription broadcast may not be shown on STV; (4) no series program with interconnected plots or substantially the same cast of characters may be offered on a subscription basis; (5) not more than ninety percent of the total STV broadcasting hours may consist of feature films and sports events combined (15 F.C.C. 2d at 597–598).

stitute an impermissible restraint on free speech violative of Section 326 of the Communications Act and the First Amendment.

A unanimous court of appeals, in a comprehensive opinion discussing all the points raised here by petitioners, concluded that the Commission has the statutory power to authorize subscription television service. Its holding was grounded upon the broad grant of general regulatory authority provided the Commission by the Communications Act in order to deal effectively with the rapidly-changing nature of radio broadcasting, a concept affirmed by this Court nearly thirty years ago in *National Broadcasting Company* v. *United States*, 319 U.S. 190, 219 (1943), and more recently in *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 167–178 (Pet. App. A–10 to A–11).

In regard to the matter of rate regulation, the court below approved the Commission's conclusion that it was not called upon at this time "to decide whether, or in what circumstances, its licensing regulatory functions might include surveillance or control over rates charged for services. The need for such control would presumably be rooted in developments in the market which demonstrated that STV had been granted a monopolistic or 'quasi-monopolistic' position, in which the competition of ordinary TV or other services was not effective to prevent abuse" (Pet. App. A–19 to A–20). On the basis of the rates charged in the Hartford experiment, the Commission had concluded that there was no likelihood of rate abuse. The lower court held that if and when the premises of its

regulatory approach change, the Commission could then reconsider the matter, but that the Commission's "predictions as to the probable course of rates and existence of meaningful competition [between STV and other forms of entertainment and enlightenment available in the community] are certainly not unreasonable" (Pet. App. A–20).

The court also found that the Commission had given full and fair consideration to the potential impact of STV on lower income groups and on free television and could reasonably find not only that there would be no adverse impact, but rather that there is a potential for substantial benefit to the public from the service (Pet. App. A–24 to A–27). Finally, the court concluded that the program limitations imposed by the Commission in order to insure that STV would operate as a supplemental program source, rather than siphoning off or merely duplicating the programming now available on free television, did not constitute an illegal restraint on free expression. It found that the purpose of the STV rules was to insure the economic vitality of free television rather than to suppress ideas and that the net effect would be to increase diversity of expression (Pet. App. A–27 to A–30).

ARGUMENT

While certain of the issues presented are not insignificant ones, the court below exhaustively discussed all relevant factors and properly sustained the Commission's *Fourth Report and Order* relating to subscription television. No arguments are raised here which were not carefully considered and correctly

resolved by the court of appeals. Accordingly, further review is not warranted.

1. The court below's holding that authorization of subscription television is consistent with the goal of the Communications Act of 1934 to foster diversity in broadcasting fully meets the test laid down by this Court in *United States* v. *Missouri Pac. R. Co.*, 278 U.S. 269, 278: "[W]here the language of an enactment is clear and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." Title III of the Act, upon which the court relied, has repeatedly been interpreted as providing a broad grant of general regulatory authority over broadcasting subject only to specific exceptions and limitations.[5] *National Broadcasting Co.* v. *United States*, 319 U.S. 190, 219; *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134, 137–138; see also *United States* v. *Southwestern Cable Co.*, 392 U.S. 157, 167–178.

While petitioners do not disagree with the "general validity" (Pet. 12) of the court's reasoning, they urge that STV is contrary to the traditional system of free television and should therefore not be authorized without a specific grant of authority by Congress

[5] See 47 U.S.C. 303, 307(a), 310, 312, 313(b). Moreover, as the lower court explained, both the legislative history of the Radio Act of 1927, 44 Stat. 1162, from which the Communications Act of 1934 is derived, and judicial precedent (see *Connecticut Committee Against Pay TV* v. *Federal Communications Commission*, 301 F. 2d 835, certiorari denied, 371 U.S. 816) support its holding (Pet. App. A–8 to A–17).

(Pet. 11–17). They argue that congressional intent can best be determined by the failure of the Communications Act to provide specifically for the rate regulation of broadcasting. However, as the lower court pointed out, "Direct charges for broadcasting services are not wholly unprecedented in this country * * *; testimony to this fact may be found in *Functional Music, Inc.* v. *FCC,* 107 U.S. App. D.C. 34, 274 F. 2d 543 (1958), cert. denied, 361 U.S. 813 (1959), and *Muzak Corp.,* 8 FCC. 581 (1941)" (Pet. App. A–12). And, although the court below, like the Commission, did not reach the question whether the Commission can regulate STV rates, it persuasively explained that whether or not the Commission has the power to establish rates is neither controlling nor necessarily relevant.

This is so, it explained, since "the principal method which Congress provided for combatting anticompetitive practices is regulation through the licensing process—a method which the Commission deemed sufficient to prevent any abuses of economic power by STV operators. See *Fourth Report,* 15 F.C.C. 2d at 548, 596–97" (Pet. App. A–19).

In this regard, the court below approved the Commission's conclusion that the experience provided by the Hartford experiment indicated no likelihood of rate abuse, and found that its "predictions as to the probable course of rates and existence of meaningful competition are certainly not unreasonable" (Pet. App. A–20). Of course, the Commission is free to reconsider the matter should experience with STV in

general operation demonstrate the necessity for more stringent regulation. As the court properly noted: "The need for such control would presumably be rooted in developments in the market" (Pet. App. A-19).[6]

2. In assessing petitioners' suggestion that the program restrictions placed on subscription television may amount to a restraint on free expression, the starting point for analysis must be the special application of First Amendment standards to broadcasting. As this Court stated last term in *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 390:

> Because of the scarcity of radio frequencies, the Government is permitted to put restraints on licensees in favor of others whose views should be expressed on this unique medium. But the people as a whole retain their interest in free speech by radio and their collective right to have the medium function consistently with the ends and purposes of the First Amendment. It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount.

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[6] Petitioners' contention (Pet. 16) that an STV licensee will be a "natural monopol[ist]," because only one can be licensed in any community, is fallacious. Under the Commission's rules, an STV licensee will necessarily face competition from at least five established conventional licensees, transmitting free programs, as well as from other forms of sports and entertainment offered "live" in the community. Both the Commission (15 F.C.C. 2d at 474–488, 497, 508–509) and the court below (Pet. App. A-21 to A-22) gave thoughtful consideration to this issue and found petitioners' argument unpersuasive.

Suppression of ideas is clearly not the purpose, nor will it be the effect, of the program restrictions placed by the Commission on STV. On the contrary, the restrictions are intended to insure that subscription television will develop as a viable supplement to free television, but not be destructive of the service that viewers are currently receiving. Thus, on the one hand, the restrictions are designed to insure that types of programs presently available to viewers of free television will not become the province of STV. On the other, the aim is to require subscription television licensees to develop new types of programming in order to compete successfully with existing service. The likely result will thus be greater, not lesser, diversity in programming, and a wider range of choice for viewers who choose to avail themselves of the new service. The court below aptly observed that "it can be said here, as in *Banzhaf,* that '[e]ven if some valued speech is inhibited by the ruling, the First Amendment gain is greater than the loss.' 405 F. 2d at 1102." (Pet. App. A–30; see *Banzhaf* v. *Federal Communications Commission,* 405 F. 2d 1082, certiorari denied *sub nom. Tobacco Institute* v. *Federal Communications Commission,* No. 47, this Term (October 13, 1969)).

3. Finally, petitioners contend that authorization of subscription television is an unconstitutional discrimination against low income groups, and ask this Court to "declare that access to free television is a constitutionally protected right" (Pet. 24). While we

share with the court below (Pet. App. A–25 to A–26) considerable skepticism as to the validity of such a far-reaching constitutional principle, the sufficient answer for present purposes is that the issue is simply not presented in this case.

The court of appeals found that the Commission's rules designed to protect free television from the siphoning of programming by STV were reasonable and amply supported by the record (Pet. App. A–25). These rules afford substantial assurance that viewers relying upon free television will suffer no diminution of the information and entertainment presently afforded to them. Moreover, the court below identified several ways in which the viewing public may be benefited by development of subscription television service. It noted, *inter alia*, that a new STV licensee will be required by the Commission to carry a minimum of 28 hours of free programming in addition to that presently available; that subscription television will provide entertainment unavailable to most of the viewing public by reason of distance, lack of seating space, or the cost of attendance at live performances; and that competition from STV may well compel conventional licensees to upgrade the quality of programming and services they presently offer (Pet. App. A–26 to A–27). In view of these considerations, the court of appeals was surely correct in characterizing petitioners' discrimination claim on behalf of the poor as "insubstantial" (Pet. App. A–25).

CONCLUSION

For the foregoing reasons, and the reasons developed at greater length in the opinion below, on which we here rely, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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